ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

LIMITATIONS

Report No. 55

December 1989

ISSN 0317-1604
ISBN 0-8886-4159-1

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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ACKNOWLEDGMENTS

This report contains recommendations for the enactment of a general limitations statute that takes a new approach to limitations law. Credit for conceptualizing and developing the new approach belongs to Thomas W. Mapp, now Professor Emeritus Faculty of Law, University of Alberta and formerly counsel to this Institute. Mr. Mapp authored the Institute's *Report for Discussion No. 4*, the precursor to this report, in which the idea was first proposed.

Institute Counsel Margaret A. Shone carried the project to completion by producing the final report. She was assisted by an Institute Committee composed of Mr. Alan Hunter, Chairman of the Institute Board; Professor Peter J. Lown, Director; Ms. Myra Bielby and Mr. Lyndon Irwin, members of the Board; and Professor Richard Bauman, now of the University of Alberta Faculty of Law and formerly an Institute counsel assigned to the limitations project.

HOW TO READ THIS REPORT

This report is divided into four parts.

Part I is a Summary.

Part II sets forth a Model Limitations Act based on our recommendations. The Act is, we think, logically organized and written in language which is both plain and legally accurate. The Model Act contains 12 sections in 8 pages in this report, a reduction from the 61 sections in 21 pages in the current Act. Because the approach is new, so is the choice of terminology. An attempt has been made to avoid the use of words that have technical meanings under the current law and to substitute in their stead generic language that can be read in an open fashion and interpreted creatively.

Part III is the Report proper. It provides an abbreviated description of the existing law, problems, need for reform and recommendations. Readers looking for a more detailed analysis should consult our *Report for Discussion No. 4* on Limitations. Copies are available from the Institute on request.

Part IV consists of the Model Act annotated to assist legal practitioners and other persons using it. For the convenience of the reader, each section of the Model Act commences on a new page. The headers on the pages containing commentary identify the section that is being discussed.

The net result is that the contents of the Report are presented in four variations. The reader can work either from the summary (Part I), from the textual discussion in the main body of the report (Part III), from the statute alone (Part II) or from the statute annotated (Part IV), as he or she prefers.

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LIMITATIONS

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PART I - SUMMARY

Background to Limitations Law

The purpose of limitations law is to encourage the timely resolution of legal controversies, and in so doing to strike a proper balance between the interests of potential claimants, potential defendants and society at large.

Limitations law has been growing piecemeal for over three and a half centuries. During this time, the basic approach to limitations law has remained unchanged. There has, however, been substantial change in the characteristics of society and consequential enlargement of legal rights and remedies. As a result of this change and enlargement, limitations law has become unduly technical and complex. It is badly in need of rethinking, of rationalization.

Recommendation for a New Approach

The Alberta Law Reform Institute has formed recommendations for a new, rational, unified approach to general limitations law. In so doing, it has taken the strong points of each of two separate strategies at work under the existing law: the limitations strategy at law - the predominant strategy under the existing law in which Alberta limitations law is firmly rooted - and the limitations strategy in equity.

The new approach continues the direction of the reform movement currently evident in judicial and statutory reforms.

(1) Basic Principles

The recommendations are founded on two basic principles.

The first basic principle is knowledge. It is derived from the limitations strategy in equity and serves the interests of claimants. The principle of knowledge involves building in discovery by the claimaint to set the limitations clock ticking. The limitation period does not begin to run until the claimant knows of of the claim, that is, until he has "discovered" or "ought to have discovered" (i) that the injury had occurred, (ii) that it was to some degree attributable to the conduct of the defendant, and (iii) that it was sufficiently serious to have warranted commencing a proceeding. After discovery, the claimant has 2 years within which to seek redress in a civil judicial proceeding. This 2-year period constitutes the **"discovery limitation period"**.

The second basic principle is repose. It incorporates the certainty of the fixed periods used in the limitations strategy at law, and serves the interests of defendants by

providing an absolute cut off date of 15 years within which the claimant must seek a remedial order. The 15-year period applies irrespective of whether the claimant has knowledge of the claim. The principle of repose facilitates longterm planning by persons subject to potential claims. As well, at a certain stage evidence and adjudication becomes defective because of the passage of time. This 15-year period constitutes the "**ultimate limitation period**".

The defendant is entitled to a limitations defence when either the discovery limitation period or the ultimate limitation period expires, whichever occurs first. The defence must be pleaded, as the traditional approach in the limitations strategy at law currently requires. A successful defence gives the defendant immunity from liability under the claim. Immunity from liability is not conferred automatically and a successful limitations defence does not expunge legal rights.

Together, in the context of the scheme proposed, these dual principles - knowledge and repose - provide a fair balance between the interests of claimants and defendants, both individually and collectively, and satisfy the interests of society at large.

(2) Special Circumstances

Special provisions modify the operation of the basic limitation periods in certain circumstances. For example, both the discovery limitation period and the ultimate limitation period are suspended during any period of time that the claimant was under disability. "Person under disability" is defined to mean either a minor, or an adult who is unable to make reasonable judgments in respect of matters relating to the claim.

The ultimate limitation period is suspended during any period of time that the defendant fraudulently concealed the fact that the injury had occurred. In the case of a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, the ultimate period begins to run when, *and not before*, the conduct terminated or the last act or omission occurred. Special provisions also apply to claims added to a proceeding, an agreement between the claimant and defendant, and acknowledgment or part payment by the defendant of a claim for the recovery of an accrued liquidated pecuniary sum.

One member of the Board argued strenuously for the retention of an equitable approach to claims for the wrongful retention or conversion of trust property by a trustee. However, after much discussion and careful consideration, the majority of the Board concluded that claims at law and in equity should be subject to the same general principles that underlie the new Act.

Scope of Recommendations

The recommendations are for a general limitations scheme. If adopted, the new scheme will apply generally to all claims coming within the scope of the general limitations scheme, regardless of whether the claim originated at law or in equity. That is to say, all claims subject to the Act are governed by the same two concurrent limitation periods except where special provisions modify their effect.

The key to the new system is what it covers. Although it is generally comprehensive in its coverage, the scheme does not embody the entire limitations system. One must go to the definitions of "claim" and "remedial order" to get to unlock the door to our tight and precise approach.

A "claim" is defined as a matter giving rise to a civil proceeding in which a claimant seeks a "remedial order".

A "remedial order" is defined as a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right. The definition expressly excludes declarations, orders for the enforcement of a remedial order, judicial review of the exercise of powers conferred on administrative bodies by statute, and *habeas corpus*. Declarations are excluded because they merely define and recognize existing rights. It should be recognized, however, that declarations represent a growth area in law. Their exclusion from the operation of the general limitations scheme leaves room for creative play by lawyers and courts.

Limitation provisions in specialized statutes dealing with particular types of claim are also excluded, as is a remedial order based on adverse possession of real property owned by the Crown.

Possessory remedies, including adverse possession of land owned by persons other than the Crown, are included.

Proposed Model Limitations Act

The report translates the recommendations into a Model Limitations Act. The Act is, we think, logically organized and written in language which is both plain and legally accurate. The Model Act contains 12 sections in 8 pages in this report, a reduction from the 61 sections in 21 pages in the current Act.

Because the Model Act adopts a new approach it adopts a new terminology. The words are used in a generic, non-technical sense. The Act speaks of a "claim" (rather than a cause of action) to denote the substantive right that may entitle a person to receive a

remedy in a civil proceeding before a court, of a "claimant" (rather than a plaintiff or applicant) who seeks a "remedial order" in respect of a "claim", and of a "defendant" (which may include a third party) as the person against whom a remedial order is sought.

Because the approach is new, upon its introduction into force the Act will require lawyers and judges to grapple with its scope and specific applications. Definitive answers to questions about the application of the Act to given fact situations will not always be possible. Until issues regarding interpretation are settled, the Act will provide lawyers with a unique and challenging opportunity to present creative arguments based on principle.

PART II - MODEL LIMITATIONS ACT

[Definitions]

1 In this Act,

(a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;

(b) "claimant" means the person who seeks a remedial order;

(c) "defendant" means a person against whom a remedial order is sought;

(d) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;

(e) "injury" means

(i) personal injury,

(ii) property damage,

(iii) economic loss,

(iv) non-performance of an obligation, or

(v) in the absence of any of the above, the breach of a duty;

(f) "law" means the law in force in the Province, and includes

(i) statutes,

(ii) judicial precedents, and

(iii) regulations;

(g) "limitation provision" includes a limitation period or notice provision that that has the effect of a limitation period;

(h) "person under disability" means

(i) a minor, or

(ii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim;

(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, and excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order,

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute, or

(iv) *habeas corpus*;

(j) "right" means any right under the law and "duty" has a correlative meaning;

(k) "security interest" means an interest in property that secures the payment or other performance of an obligation.

[Application]

2(1) Except as provided in subsection (2), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

(a) the remedial order is sought in a proceeding before a court created by the Province, or

(b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.

(2) This Act does not apply where a claimant seeks:

(a) a remedial order based on adverse possession of real property owned by the Crown, or

(b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

(3) The Crown is bound by this Act.

[Limitation Periods]

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in his circumstances ought to have known,

(i) that the injury for which he seeks a remedial order had occurred,

(ii) that the injury was to some degree attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding,

or

(b) 15 years after the claim arose,

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2) The limitation period provided by clause (1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in clause (1)(a);

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in clause (1)(a) to the principal first actually acquired that knowledge;

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge more than 2 years before his death,

(ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge after his appointment.

(3) For the purposes of clause (1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions arises when the conduct terminated or the last act or omission occurred;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurred;

(c) a claim based on a demand obligation arises when a default in performance occurred after a demand for performance was made;

(d) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution arises when the claimant for contribution was made a defendant in respect of, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based, whichever first occurs.

(4) The limitation period provided by clause 3(1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 60 of the *Law of Property Act*.

(5) Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by clause (1)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by clause (1)(b).

[Acquiescence or Laches]

4 Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

[Concealment]

5(1) **The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant fraudulently concealed the fact that the injury for which a remedial order is sought had occurred.**

(2) **Under this section, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.**

[Persons under Disability]

6(1) **The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.**

(2) **Under this section, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.**

[Claims Added to a Proceeding]

7(1) **Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.**

(2) **When the added claim**

(a) **is made by a defendant in the proceeding against a claimant in the proceeding, or**

(b) **does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,**

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) **When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,**

(a) **the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,**

(b) **the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim**

that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of clause (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of clause (3)(b) or 4(b), if in issue, was not satisfied.

[Agreement]

8 Subject to section 10, if an agreement provides for the reduction or extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

[Acknowledgment and Part Payment]

9(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income, a share of estate property, and interest on any of the foregoing.

(2) Subject to subsections (3) and (4) and section 10, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.

(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(4) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

[Persons Affected by Exceptions for Agreement, Acknowledgment and Part Payment]

10(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(2) (a) An agreement made by or with an agent has the same effect as if made by or with the principal, and

(b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.

(3) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he derives a claim, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(4) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) he is a maker of it, or

(b) he is liable in respect of a claim

(i) as a successor of a maker, or

(ii) **through the acquisition of an interest in property from or through a maker**

who was liable in respect of the claim.

[Judgment for Payment of Money]

11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[Conflict of Laws]

12 The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

[Transitional]

13*(1) Subject to subsection (2), this Act applies where a claimant seeks a remedial order in a proceeding commenced after the date the Act comes into force.*

(2) A defendant is not entitled to immunity from liability in respect of a claim of which the claimant knew, or in his circumstances ought to have known before this Act came into force and in respect of which a remedial order is sought

(a) in time to satisfy the provisions of law governing the commencement of actions which would have been applicable but for this Act, and

(b) within 2 years after the date this Act comes into force.

[Consequential]

14*(1) Section 60 of the Law of Property Act is amended by adding the following:*

(3) No right to the access and use of light or any other easement, right in gross or *profit a prendre* shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.

(2) The Limitation of Actions Act is repealed.

PART III - REPORT

CHAPTER 1 - INTRODUCTION

A. Reason for Institute Project

Alberta limitations law is firmly rooted in the traditional English statutory approach. That approach has remained unchanged for more than three and a half centuries. Changes in the formation of society over this period (e.g. the growing complexity of industrial, commercial and governmental institutions since the industrial revolution, and the dramatic growth in populations) have led to a larger, more intricate body of law, the recognition of additional rights and the enlargement of the battery of remedies available for the infringement of rights. As a result of these changes limitations law has grown unduly technical and complex. The undue technicality and complexity has spurred a current limitations law reform movement, of which the recommendations in this report form a part, in jurisdictions that have adopted the traditional English approach.

B. Meaning of Limitations Law

What is limitations law? Limitations law consists of a body of rules, applied in civil judicial proceedings, which limits the time available to a person (a claimant) to bring a claim against another (a defendant) requesting a judicial remedy for the alleged violation of a legal right. The object of the limitations system is to encourage the timely resolution of legal controversies, and in so doing to strike a proper balance among the interests of potential claimants, potential defendants and society at large.

Conventional limitations statutes operate by limiting the time available to a claimant for bringing a claim seeking a judicial remedy. The time available is limited by giving the defendant a defence to any claim which is not brought within the limitation period specified for that particular type of claim. The defence, which the defendant must request, gives the defendant complete immunity from any liability under a claim, regardless of the merits of that claim.

C. Conduct of Project

In September 1986, following a lengthy history of work on the project, the Institute published *Report for Discussion No. 4* (hereafter "the Report for Discussion"). In the Report for Discussion, we stated our view that the traditional English statutory approach to limitations is obsolescent and made tentative recommendations for a new approach to general limitations law. Our purpose in publishing our recommendations in tentative form was to stimulate discussion and elicit constructive comments on the proposed reform.

We conducted consultation on the Report for Discussion in the months following publication. In December 1987, we held an invitational workshop to which we invited representatives of the judiciary, academics and leading members of the litigation bar. The consultation satisfied us that widespread support exists for the new approach to general limitations law contained in our tentative recommendations.

D. Principal Recommendation

Our principal recommendation in this report is that Alberta enact a completely new limitations statute embodying the new approach to general limitations law that we proposed in the Report for Discussion. We believe that the specific recommendations in this report can, if accepted, result in a new Alberta Act which will be not only fairer for all persons than the present Act, but simpler and more comprehensible as well.

E. Caveat on Scope of Principal Recommendation

Our recommendation is for the introduction, in civil judicial proceedings, of a general limitations scheme that would replace the one now in effect. The recommendation does not embrace the entire limitations system. In addition to the general limitations statute that applies to civil judicial claims, the limitations system includes specific limitations provisions in other legislation, as well as a multitude of time-limited notice provisions that take effect, functionally, as limitations periods.

CHAPTER 2 - THE LIMITATIONS SYSTEM

A. The Present Alberta Act

Alberta limitations law is based on the traditional English approach to limitations law, which is statutory. Statutory measures that limit the period within which an action must be commenced or else be barred have a history that stretches back to an English statute of 1623, the *Limitation Act, 1623* (U.K.).[1] This statute of James I was the first relatively comprehensive English limitations act.

The central statute in the current Alberta limitations system is the *Limitation of Actions Act*[2] (hereafter the "present Alberta Act"), enacted in 1935.[3] It is based on the *Uniform Limitation of Actions Act* (hereafter the "1931 Uniform Act"), which was adopted by the Conference of Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference of Canada) in 1931. The 1931 Uniform Act consolidated the *Limitations Act, 1623* with several other English limitations statutes,[4] modernized them and combined them with some new initiatives. With minor local variations, the 1931 Uniform Act is also currently in force in Manitoba,[5] Prince Edward Island,[6] Saskatchewan,[7] the Yukon Territory[8] and the Northwest Territories.[9]

The most significant amendments to the present Alberta Act, made in 1966,[10] eliminated certain short limitation periods and consolidated a number of limitation provisions formerly found in other statutes into the present Alberta Act. Although the 1931

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1 21 Jac. 1, c. 16.

2 R.S.A. 1980, c. L-15.

3 S.A. 1935, c. 8.

4 The most notable of these were the *Real Property Limitation Acts* of 1833 (3 & 4 Will. 4, cs. 27 and 42), 1837 (7 Will. 4 & 1 Vict., c. 28), and 1874 (37 & 38 Vict., c. 57). A complete list is given by the Ontario Law Reform Commission, *Report on Limitation of Actions*, 11 (1969).

5 The *Limitation of Actions Act*, C.C.S.M., c. L150.

6 *Statute of Limitations*, R.S.P.E.I. 1974, c. S-7.

7 The *Limitation of Actions Act*, R.S.S. 1978, c. L-15.

8 *Limitation of Actions Ordinance*, R.O.Y.T. 1978, c. L-7.

9 *Limitation of Actions Ordinance*, R.O.N.W.T. 1974, c. L-6.

10 *An Act to Amend the Law Respecting Limitation of Actions in Tort*, S.A. 1966, c. 49.

Uniform Act, and hence the present Alberta Act, significantly improved the limitations system embodied in their predecessor English statutes, the modern Canadian acts remain based on a limitations strategy formulated in England over three and a half centuries ago.

As stated in chapter 1, in addition to the general limitations statute that applies to civil judicial claims, the limitations system includes specific limitations provisions in other legislation, as well as a multitude of time-limited notice provisions that take effect, functionally, as limitations periods. Appendix ? to this report contains a list of specialized statutes in Alberta with limitation or notice provisions which we believe are within the scope of the limitations system, but which are not embraced by our recommendations in this report. The list, which is reproduced from Appendix C to the Report for Discussion, was compiled from the comprehensive list of limitation provisions in specialized statutes in the *Alberta Limitations Manual* published by Butterworths (1983).

B. Reasons for a Limitations System

The objective of a limitations system is to encourage the timely resolution of controversies.

The limitations system seeks to give defendants as much protection as is reasonably possible without unduly jeopardizing the broader goal of the judicial system. That goal is to protect the legal rights recognized by our legal system by providing judicial remedies for claimants whose rights have been violated. The judicial system must give a claimant an adequate opportunity to bring a claim for the recognition of a right and for a judicial remedy for its infringement. The limitations system, which is subsidiary to the judicial system, limits the time available to a claimant for bringing a claim seeking a judicial remedy. If a claim is not brought within the applicable limitation period, the defendant is, upon his request, given a defence to the claim. The defence gives the defendant complete immunity from any liability under a claim, regardless of the merits of that claim. As such, a limitations system inevitably prevents some claimants from having the validity of their claims adjudicated on the merits.

Simply put, in encouraging the timely resolution of disputes, a limitations system must strike a proper balance among the interests of potential claimants, potential defendants and society at large. Potential claimants have an interest in obtaining a remedy for injury from legally wrongful conduct; potential defendants have an interest in being protected from endless claims; and society at large has an interest in providing a range of remedies for injury from wrongful conduct and an orderly and fair process for determining when it is appropriate to award them.

The rationale for the first limitation law, enacted in the United Kingdom in 1623, remains very much alive. Then, as now, legislators identified three categories of reasons

for maintaining a limitations system: providing adequate evidence, obtaining eventual peace and repose, and serving economic interests.

(1) Evidentiary Reasons

The determination of a dispute depends on the application of law to facts which must be proved. With the passage of time after events have been alleged to have occurred, the evidence necessary to prove the facts will deteriorate. Over time the memories of witnesses will fade, witnesses will die or leave the jurisdiction, and written records will be lost or destroyed.

Defendants are more vulnerable to deteriorated evidence than are claimants. The claimant who sustained the harm may have a better recollection of the facts. The claimant controls the timing of his claim, and can hold back his claim, yet preserve and augment his evidence by collecting statements, affidavits and documents while the defendant's evidence is deteriorating. The defendant, on the other hand, may be unaware of which precise act or omission in his many daily activities might constitute a breach of duty owed to someone else. This is particularly so for defendants who are in the business of providing goods and services for others (e.g. manufacturers of products, persons in professions).

(2) Reasons Based on Peace and Repose

Individuals and the larger society both have an interest in the eventual securement of peace and repose. With respect to individual peace, the defendant is entitled to have the legal issue resolved in a timely manner. At some point in time after the occurrence of conduct which might have been legally wrongful, a defendant should gain peace of mind. With respect to societal peace, there is a need for a time when, insofar as human transgressions are concerned, society is freed from stale conflicts and the slate is wiped clean. In assisting in the orderly resolution of conflicts, the the judicial system should therefore shelter itself from old conflicts which could reasonably have been submitted for litigation in the past.

(3) Economic Reasons

While a defendant is vulnerable to possible liability of uncertain magnitude under a claim, his ability to enter into business transactions may be adversely affected. If the defendant's potential liability is significant, he may be reluctant to make new business commitments until the legal issues are resolved. A claimant who threatens, but delays bringing a claim, can sometimes extract an unreasonable settlement from a defendant caught in this situation.

Persons who are regularly engaged in providing goods and services for others in the course of their occupations and who are therefore particularly vulnerable to claims, frequently preserve records of their activities and usually maintain costly liability insurance. The expenses of records maintenance and insurance are generally passed on to the consuming society. Within one or two decades after the occurrence of the events upon which a group of claims could be based, most of these claims will have been either abandoned, settled or litigated. At this point the result of peace denied can become excessive cost incurred, for the cost burden on the entire society is too high relative to any benefits which might be conferred on a tiny group of claimants by keeping defendants exposed to claims.

In short, limitations law encourages potential defendants to make considered business decisions without having the spectre of future claims loom past a reasonable date, and this further allows actuarial risks to be calculated, so that a potential defendant can take steps to insure an enterprise against possible claims as well as make the most beneficial or socially useful allocation of the enterprise's resources.

(4) Judgmental Reasons

The three reasons enumerated above constitute the traditional justification of a limitations system. To them might be added a fourth, which is enabling fair judicial decision, or "judgmental reasons".[11]

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11 Some persons argue that there is a fifth reason, which is that a limitations system can be used to constrain the impact of man-made disasters on the legal system by screening out some of them. We do not accept this reason but record it here in the interests of the fullness of our account.

The argument for including reasons based on the magnitude of damage rests on the conclusion is that the legal system cannot adequately cope with the sheer magnitude of losses resulting from man-made disasters made possible by technological development (e.g. nuclear explosion, faulty drug). Although a judge can grant money judgments directing defendant to pay huge damages to hundreds of claimants to compensate them for the injuries suffered in a disaster, the defendant will seldom have the financial resources, even with insurance, to pay more than token fractions of the money awarded. The legal costs involved in the litigation required to produce the money judgments will frequently consume a significant percentage of the money which would otherwise be available for payments. It is argued therefore that manmade disasters should be withdrawn from the legal system and left to the political system. Manmade disasters would then be treated as natural disasters.

In our opinion, the financial consequences described reflect the insufficient strength of a private economic system, not a defect in the legal system. Even if withdrawing man-made disasters from the legal system were sound public policy,

(continued...)

Judgmental reasons fall into two areas, one having to do with proof of facts and the other with the application of law to the facts. With respect to proof of facts, the accuracy of a judge's factual determinations depends on the adequacy of the evidence available to prove the true facts. As has been seen, evidence is likely to become increasingly incomplete and unreliable with the passage of time. The relative vulnerability of the defendant to the deterioration of evidence has a serious adverse effect on the ability of the adversarial judicial system to do justice between the claimant and defendant. When a point in time has been reached when evidence has become too unreliable to furnish a sound basis for a judicial decision, out of fairness to the defendant, public policy dictates that a claim should not be adjudicated at all.

With respect to the application of law, the continual evolution of the law to reflect current socio-economic values makes questions of law as it stood at the time of the alleged breach of duty more difficult to determine fairly and accurately with the passage of time, especialiy where the law is judge-made. It is often very difficult for a judge of a current generation to weigh the reasonableness of conduct which occurred many years ago as a judge of an earlier generation would have weighed it. Because cultural values change, conduct which was acceptable even 20 years ago is unacceptable today. The relative inability of one generation to judge the reasonableness of conduct of members of an older generation could lead to injustice in some cases. When human ability to judge the reasonableness of past conduct has seriously diminished, society must insist that the court stay its hand. Limitations law ensures that conduct giving rise to an action will be judged according to more or less current cultural standards.

C. Two Limitations Strategies

The English legal system developed two radically divergent strategies for a limitations system. The two strategies may be described as "the strategy in equity" and "the strategy at law". The primary objective of both strategies is to provide a limitations system which is fair and efficient.

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[11](...continued)
we do not believe that a limitations system should be used to promote this objective. Our reason is that a limitations system would operate too capriciously to be either effective or fair, that claims would be screened too unevenly.

(1) The Strategy at Law - the Conventional Approach

(a) Description

The limitations system at law continues to follow the strategy that was first formulated in the *Limitations Act, 1623* (U.K.). The strategy has always been embodied in legislation. The present Alberta Act is representative.

The strategy involves three main elements: (1) the assignment of claims to different categories; (2) the use of different limitation periods of fixed duration for different categories of claim; and (3) the commencement of limitation periods at time of accrual of claim. Each of these elements is discussed below. If the claimant does not bring a claim before the expiration of the applicable limitation period, the claim is barred if the defendant asserts a limitations defence. The legal limitations system also provides for the suspension of the limitation period for a person under disability, and variation of the limitation period because of agreement or admission.

(i) Categorization of claims

This system divides claims into a number of different categories. For purposes of its assignment to the appropriate category, the court must first characterize the claim according to principles of the general law (e.g. tort, contract, trust, property). It must then determine which category in the limitations act was intended to apply to the claim.

(ii) Different limitation periods of fixed duration

Each category of claim is matched with one of several fixed limitation periods, each of a different duration. The present Alberta Act utilizes four basic fixed limitation periods of one, two, six and ten years. For example, for most tort claims the limitation period is 2 years beginning with the accrual of the claim, and for most contract claims the period is 6 years beginning with the accrual of the claim.

(iii) Commencement at time of accrual

The beginning of the limitation period is normally determined by objective facts - whether or not certain events took place, and the circumstances under which they took place - coupled with a rule of law fixing the time of accrual of the claim. The determination of the precise date of accrual is a technical legal issue that depends on how the claim is characterized for purposes of its assignment to the appropriate category under the Act.

(b) Advantages

The limitations system at law is designed to operate as mechanically as possible under fixed rules of law. It attempts to provide limitation periods which are not only reasonable, but which will expire at times which can be predicted by the parties with a high degree of certainty.

(c) Disadvantages

In theory, this limitations strategy is simple, it should be easily understood by the public, and it should operate with almost mechanical efficiency. However, it suffers from inherent problems which raise grave doubts that it has produced a limitations system which is sufficiently fair, efficient and predictable.

Not infrequently the general law leaves it uncertain as to how a claim should properly be characterized, and the limitations act does not clearly establish the category applicable to the claims that form part of an increasingly large and complex body of law. These characterization and categorization problems involve issues of law which are often quite technical, and which are seldom very comprehensible to the litigants. Because they create uncertainty as to which of several possible limitation periods applies to some claims, they leave the time of expiration of the limitation period applicable to these claims uncertain.

As previously stated, most claims are covered by a limitation period that begins to run when the claim accrues. The boundaries of the statutory categories that underlie the determination of the date of accrual are neither rigid nor indisputable. Consequently there will be in many cases a serious degree of uncertainty over which date is the proper one for determining when an action must be started.

Which fixed limitation period is applicable to a specific claim depends on the category into which the claim falls, and that depends on the descriptions used for different types of claims. Many different methods can be used to describe a type of claim, and usually several of these methods are used for a particular type of claim. This frequently results in overlapping descriptions. For example, a lawyer can often mount a credible argument that a specific claim could be either a type A claim (subject to a 2-year limitation period), a type B claim (subject to a 6-year limitation period), or a type C claim (subject to no limitation period). Whether or not a limitations defence is available to a defendant thus often depends on how a specific claim before the court is characterized as to type. When this occurs, neither the litigation nor its result can be explained to the litigants in terms which have anything to do with the common sense issue of whether or not the claim was brought as soon as it reasonably could and should have been brought.

In a significant minority of cases there is a substantial gap between the time of accrual of a claim and the time of its discovery. This gap varies widely depending on the categorization of the claim and the facts unique to each case. All too frequently the relevant limitation period will expire before the claimant could reasonably discover enough information to warrant a conclusion that he should bring a claim. This we believe is unfair to claimants.

Probably even more frequently a claimant will have acquired all the information he needs to justify bringing a claim long before the expiration of the applicable limitation period. For this reason the present system gives defendants less protection than we think it should.

(2) The Strategy in Equity

(a) Description

The limitations system in equity uses a strategy which was developed by English equity judges. It is known as the doctrine of laches. The strategy is judge-made, not statutory, in origin, and the dominant theme is judicial discretion. Although there has been a movement in common law jurisdictions since the nineteenth century to subject equitable claims to statutes of limitations, the doctrine of laches remains applicable to equitable claims which are not governed by a limitations act.

The doctrine of laches involves two main elements: first, the duration of the limitation period is measured by judicial discretion and, second, the operation of the limitation period commences at the time of discovery.

(i) Measurement by judicial discretion

Judicial discretion governs the duration and hence the time of expiration of the limitation period. The duration of the limitation period is ascertained by the discretionary process of balancing the claimant's justification for delay against the prejudicial consequences to the defendant caused by the delay.

(ii) Commencement at time of discovery

The limitation period begins at the time of discovery. Because it determines the amount of knowledge which will serve to activate the limitation period, judicial discretion strongly affects the time of commencement of this period.

(b) Advantages

The primary advantage of the equitable limitations system is fairness. It guards against the denial of a remedial claim until the claimant has had a reasonable opportunity to determine that he is probably entitled to a judicial remedy and to request that remedy.

A second important advantage is that the system is comprehensible. It can be readily understood by the litigants, for it is based on two simple equitable rules which, collectively, articulate the functional objectives of a limitations system in sensible terms. The application of these rules depends upon judicial determinations of questions of fact which are relevant to the litigants. Consequently, litigation under the equitable system is not technical, and it rarely produces expensive appeals. A lawyer representing a claimant can tell his client that his remedy is barred because, on the facts established by the evidence, he either discovered or should have discovered a breach of duty but did nothing to enforce his rights for an excessive length of time. Although this may be a bitter pill for the claimant, it can at least be understood as the application of a common-sense policy in the light of the proven facts.

(c) Disadvantages

A serious disadvantage of the equitable system is that the flexibility made possible by judicial discretion leaves the time of expiration of the limitation period relatively uncertain in all cases. In a relatively few cases, the claimant will not obtain the knowledge required to activate the limitation period until decades after the conduct for which the defendant is responsible took place (e.g. adverse consequences to health from workplace pollution). Because of the possibility of these cases, as a practical matter, potential defendants can never be certain that they will be entitled to immunity from liability under a claim at some reasonable time after the occurrence of their conduct; the slate is never wiped clean. In most cases claimants will obtain the requisite knowledge soon enough to permit defendants to rely justifiably on the system to give them reasonable protection from the hazards inherent in defending themselves from stale claims. However, even in these cases, the exact time of expiration of the limitation period will remain uncertain until the claim is brought and the court determines whether or not the defendant is entitled to immunity for limitations reasons.

CHAPTER 3 - NEED FOR REFORM

A. Problems With the Existing Law

Five principal problems with the existing limitations system are that: (1) all too often it operates unreasonably; (2) the limitation periods are not sufficiently predictable; (3) the outcome depends on the application of legal rules that are unnecessarily complex and technical; (4) in a significant minority of cases, the time of accrual varies widely from the time of discovery; and (5) it can seldom be understood by litigants.

(1) Unreasonable

The limitations strategy at law results in limitation periods which are too often unreasonable, either to claimants or defendants. A limitations period may be unreasonable if does not provide an adequate discovery period, or an adequate negotiation period within which to avoid legal action by settling differences. It should prevent a claimant from bringing a claim unduly late, but it should not require him to bring one with undue haste. A limitations system should not encourage unnecessary civil proceedings or unnecessary legal costs. All three of the essential elements on which the strategy at law is based - the commencement of the limitation period at the time of accrual, the use of different limitation periods of fixed duration, and the assignment of different limitation periods to different categories of claims - contribute to the unreasonable results.

(2) Inefficient

The limitations strategy at law produces a limitations system which does not offer sufficiently predictable limitation periods, and which does not, therefore, operate efficiently. The heavy reliance on judicial accrual rules and the need for characterization and categorization of claims are responsible for this uncertainty.

(3) Unduly Technical and Complex

Accrual rules, characterization rules, and the need to categorize claims produce a highly legalistic system. As law, with its rights and remedies, has grown more complex, the unusual has become more usual, and claims cannot be placed into categories with any reliable relevance to their discovery periods, economic importance, or vulnerability to deteriorated evidence. For most claims, the limitation period beings to run when the claim accrued. Unfortunately, when some types of claims accrue is a technical legal issue. Moreover, the limitation period which has been assigned to a particular category of claims has varied in different jurisdictions. If the present practice were sound, we doubt that the diversity of treatment of a category of claims would be so prevalent. We think that it is proper to ask what, if anything, accrual, characterization and categorization rules have to

do with whether or not a claim was brought in a timely fashion. Sound justification for the use of different rules is hard to find.

(4) Time of Accrual at Variance with Time of Discovery

The critical problem with the present Alberta Act is that in a significant minority of cases there is a substantial gap between the time of accrual of a claim and the time of its discovery, a gap that varies widely depending on the facts of each case. A fixed limitation period which is reasonable for the majority of cases will operate harshly upon a claimant who did not discover the necessary information within that period. However, if the fixed limitation period is lengthened, it will give claimants in the typical cases an unnecessarily long period of time, to the possible prejudice of defendants.

(5) Incomprehensible to Litigants

The outcome of litigation under a limitations system produced by the strategy at law does not depend on factual issues related to limitations policy which can be understood by the litigants. Whether or not a limitations defence is available to a defendant often depends on how a specific claim before the court is characterized as to type. When this occurs, neither the litigation nor its result can be explained to the litigants in terms which have anything to do with the common sense issue of whether or not the claim was brought as soon as it reasonably could and should have been brought.

B. Trends in Reform

The body of rules which makes up limitations law includes both statutory provisions and case law.

(1) Judicial Interpretation of Existing Statutes

Beginning in England in 1976, with the judgment of the Court of Appeal in the case of *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.*,[12] courts in England and Canada have looked at the idea that discovery of the damage by the claimant should start time running under limitation periods in traditional limitation statutes. Although in England, in 1983, the House of Lords subsequently rejected the employment of the discovery principle,[13] in Canada, in 1984, the Supreme Court affirmed it in the case of the *City of Kamloops* v. *Nielsen*.[14] The adoption by the Supreme Court of Canada of a

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12 [1976] 1 Q.B. 858, [1976] 2 All E.R. 65 (C.A.)

13 *Pirelli General Cable Works Ltd.* v. *Oscar Faber & Partners* [1983] 2 A.C. 1 (H.L.).

14 [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641.

discoverability principle, at least for claims founded in tort, was reinforced by the 1986 judgment of the majority of the Court in *Central and Eastern Trust Co.* v. *Rafuse*.[15]

In Alberta, the Court of Appeal has resisted the introduction of the discoverability principle. In *Costigan* v. *Ruzicka*, a case decided nearly contemporaneously with the Supreme Court's decision in *Kamloops* v. *Nielsen*, the Alberta Court of Appeal held to the principle that the limitation period runs from the accrual of the cause of action, regardless of whether the claimant could have discovered the existence of facts material to a cause of action, and regardless of the fact that this approach may "often be harsh in its application". In *Fidelity Trust Company* v. *Weiler*,[16] a case decided after the judgment of the Supreme Court of Canada in *Central Trust* v. *Rafuse*, the Alberta Court of Appeal concluded that the discoverability rule laid down in the *Kamloops* and *Central Trust* cases does not apply to actions in contract in Alberta. The Court distinguished *Central Trust*, saying that the fact that there was concurrent tort liability in that case was critical to the decision.

Generally, Alberta courts have interpreted the Supreme Court of Canada judgment in *Kamloops* v. *Nielsen* narrowly on its facts, which relate to property damage, and on the law in British Columbia on which it originated. Some cases where the issue of the application of the discoverability principle might have been considered have been decided on other points.[17]

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15 [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481.

16 [1988] 6 W.W.R. 428 (Alta. C.A.) at 436.

17 In the case of *Costello* v. *City of Calgary*, unreported judgment delivered July 4, 1989 in Appeal #19837, the Court of Appeal determined that the claim was brought within the limitation period on either of the arguments made by the City of Calgary about when "the cause of action arose". It therefore did not address the discoverability question. The trial judge had expressed the view that *Costigan* v. *Ruzicka* is no longer good law in Alberta on the limitations point: *Costello* v. *City of Calgary*, (1987) 55 Alta. L.R. (2d) 97 (Q.B.).

In the case of the case of *Photinopoulos* v. *Photinopoulos* [1989] 2 W.W.R. 56, the Alberta Court of Appeal declined to decide whether s. 57 of the present Alberta Act, on fraudulent concealment of the existence of a cause of action, embodies the discoverability rule enunciated by the Supreme Court of Canada in *Rafuse*, saying:

> As the same result is reached under either test, no decision between them need be made. It is appropriate to leave the question of the application of the discoverability rule to s. 57 for another day.

The Court of Appeal was also explicit about the fact that it was not determining the discovery issue in the case of *Huston Estate* v. *Registrar of the North Alberta*

(continued...)

Courts in other provinces, notably the Ontario Court of appeal in the *Consumers Glass* case[18] and the British Columbia Court of Appeal in the *Gladwin Square Jewellers* case,[19] have applied the discoverability principle more broadly.

The net result of recent judicial interpretation is that the scope of application of the discovery principle to commence time running for existing limitation periods is fairly uncertain. A wide divergence of views exists about the categories of claim to which the discovery principle should apply. A major shortcoming of the discovery principle being formulated by the judiciary is that it does not provide an ultimate cut-off point after which a claim can no longer be sustained. Judges in a number of cases have offered the opinion that legislatures are better equipped than courts to develop new limitations rules. An example is provided by Mr. Justice Laycraft (now C.J.A.) who stated, in his judgment in the case of *Costigan* v. *Ruzicka*, that:

> That balance of competing interests must, in my respectful opinion, be accomplished by legislation of general import and not in response to the hard case.[20]

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[17](...continued)
Land Registration District (1989) 96 A.R. 300 (Alta. C.A.):

> We want to make it very clear that we are not agreeing or disagreeing with the learned chambers judge when he found a discoverability rule inside the limitation period. That issue is not reached in this case.

In *Boorman* v. *Red Deer Ski & Recreation Area Ltd.*, judgment of the Court of Queen's Bench of Alberta delivered July 19, 1989 in Action No. 8901-02711, Forsyth J., held that sections 51 and 52 of the present Alberta Act deal expressly with personal injury cases in which there is concurrent liability in contract and tort, and a 2-year period applies.

[18] *Consumer Glass Co. Ltd.* v. *Foundation Co. of Canada Ltd.* (1985) 10 D.L.R. (4th) 126 (Ont. C.A.). *See also July* v. *Neal* (1986) 44 M.V.R. 1 (Ont. C.A.).

[19] *Gladwin Square Jewellers Ltd.* v. *Chubb Industries Limited* 1985 68 B.C.L.R. 74 (C.A.).

[20] (1985) 13 D.L.R. (4th) 368 at 377 (Leave to appeal to the Supreme Court of Canada refused: (1985) 58 A.R. 1).

(2) Recent Reports and Statutes in Other Jurisdiction

During the twentieth century, the limitations statutes in much of the common law world have been seen as defective. Because of this a reform movement has occurred which has resulted in a number of significant reform reports and new statutes.[21]

These new statutes, whether enacted or recommended, are all designed in terms of a basic initial commitment to the strategy at law. That is to say, they utilize a set of fixed limitation periods, beginning when the claim arose, with different limitation periods matched to different categories of claims. However, they all also combine features of the strategy in equity. That is to say, they all adopt a discovery rule to trigger the running of the limitation period applicable to more claims than in traditional limitations statutes like the present Alberta Act. The use of a discovery rule protects the claimant from being barred from a remedy before he could reasonably have discovered his claim. As well, some of them utilize more judicial discretion.

In short, each of these statutes represents an amalgamation of the two historic strategies. However, the fit between the two strategies is not entirely comfortable and the problems with the strategy at law remain.

C. Options for Reform

Limitations law is not an area in which the basic policies are in dispute. The real problem for reform in this area arises out of inquiries into how the law should be moulded so as to reflect a balanced concern for the interests of all those parties who might launch or defend actions, who might be drawn into actions already begun, or who might be unaware of a cause of action or be unable by reason of some disability to pursue it.

We have considered three different approaches we might take to the reform of limitations law in Alberta. First, we could recommend the amendment of the present Alberta Act. Second, we could recommend the use of one of the more modern acts that combines an initial commitment to the strategy at law with features of the strategy in equity, with such amendments as we think beneficial. Third, we could recommend a completely new statute.

(1) Amend the Present Alberta Act

The present Alberta Act is based on the 1931 Uniform Act. The Uniform Law Conference of Canada adopted and recommended a new act, the Uniform Limitations Act (hereafter the "1982 Uniform Act") in 1982. Although no jurisdiction has yet enacted the

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21 *See* Appendix A.

1982 Uniform Act, we believe that it is a significant improvement over the present Alberta Act. Indeed, the 1982 Uniform Act is largely based on a report prepared by the Alberta Commissioners to the Uniform Law Conference. As between these two Acts, we would therefore use the 1982 Uniform Act as our preferred starting point.

(2) Adopt a Conventional Modern Model

The two modern acts we considered most actively are the 1982 Uniform Act referred to in the previous paragraph and the *British Columbia Limitation Act* (hereafter the "B.C. Act") enacted in 1975. We believe that, of the two, the B.C. Act is the more modern model. It is shorter, it is relatively well organized and drafted, and it accomplishes, from a substantive point of view, what is required. Although the B.C. Act was enacted in 1975, and the Uniform Act was not adopted until 1982, the B.C. Act is based on the *Report on Limitations*; *Part 2 General* of the Law Reform Commission of British Columbia, issued in 1974 (hereafter the "B.C. Report"), and that Commission had access to the report of the Alberta Commissioners on which the 1982 Uniform Act is based. We reproduced the B.C. Act as an appendix to the Report for Discussion.

In our view, the importation, in conventional modern statutes, of features of the strategy in equity into a limitations system based on the strategy at law does not answer many of the categorization, classification and accrual problems that make the existing law unsatisfactory. Although the conventional modern statutes improve upon the present Alberta Act, they do not provide a complete solution. We have grave reservations about the adequacy of a limitations system based on the strategy at law to properly balance the interests of claimants, defendants and society.

(3) Enact Legislation Based on the Strategy in Equity

We believe that the comprehensibility of the equitable limitations system gives it a decided advantage over a system which requires the result to be explained in terms of such highly technical legal rules as those determining the time of accrual of a cause of action, and the characterization and categorization of a remedial claim for the purpose of assigning to it one of a number of fixed limitation periods.

Although the guidelines within which equity operates make it possible for lawyers to predict the approximate length of the period which will be allowed in equity for bringing a claim, nevertheless, we do consider this residual uncertainty surrounding the time of expiration of the limitation period in equity a serious disadvantage.

D. Decision to Recommend a New Act

We do not think that the present Alberta limitations system operates with sufficient fairness, for either claimants or defendants. Our conclusion is that there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claims.

We have discussed the two historic limitation strategies at length. It is now clear that a new strategy, utilizing design elements from both of the classic models, is evolving through the current reform movement. Although we believe that the Alberta limitations statute should continue to combine elements from both the legal and equitable systems, in terms of its basic orientation, which depends on the operation of the limitation periods, we believe that it should rely to a much more significant degree on the equitable strategy. Changing and clarifying limitations law so that all participants in the legal process might grasp the requisite procedural elements is a key factor influencing our opinion.

We believe that the best course is for us to recommend a completely new limitations statute. The new statute would incorporate ideas from our own deliberations, from the 1982 Uniform Act, from the B.C. Act, and from many other modern limitation provisions enacted in common law jurisdictions which, looked at collectively, recombine the two basic limitations strategies into a distinctly new limitations strategy based on the strategy in equity.

We have reached our decision knowing that the experience of three centuries has shown that it is a formidable task to design a limitations system that will deal adequately with both the significant minority of cases in which the gap between accrual and discovery is relatively long and unpredictable and the majority of cases in which that gap is relatively short and predictable. Our recommendations simply reflect a continuing law reform process; they build on the experiments and experiences of other jurisdictions. We hope that the Model Limitations Act (hereafter the "new Alberta Act") we recommend will contribute to reform in Alberta, and that other jurisdictions will choose to adopt and build on it, thus continuing the process of ongoing reform.

In developing the specific recommendations incorporated in the new Alberta Act we have been guided by seven general principles. They are:

(i) Fairness. The Act should strike as fair a balance between the interests of claimants and defendants as is possible.

(ii) Comprehensiveness. The primary element in the Alberta limitations system should be an Act which includes, insofar as feasible, all limitation provisions in force in Alberta.

(iii) Comprehensibility. The Act should be as comprehensible as possible for all persons, laymen and lawyers, who will be affected by it.

(iv) Clarity. Each provision of the Act should, insofar as possible, express its purpose, scope and method of operation unambiguously.

(v) Organization. The provisions of the Act should be organized in a logical sequence in order to enhance their clarity and to eliminate redundancy.

(vi) Plain language. The Act should be drafted in contemporary plain language.

(vii) Simplicity. The Act should contain provisions expressing fundamental principles designed to be applicable in most cases, and it should not be burdened with technical solutions for rare cases.

CHAPTER 4 - RECOMMENDATIONS FOR REFORM

A. Principal Recommendation

Our principal recommendation is that Alberta enact a completely new limitations statute.

The philosophy underlying the new Alberta Act essentially continues the objectives that underlie the present Alberta Act. The limitations system must strike an appropriate balance between the interests of claimants, defendants and society. That is to say, in fashioning a limitations system it is necessary to be mindful of the injustice which will be done to either claimants or defendants by an improper balance, and to attempt to strike the balance which will achieve the most justice with the least injustice. The crucial differences that arise between the current and the proposed measures reflect how complex the current scheme has become and how difficult it is for a claimant or defendant to predict how the current limitations law will affect the rights of the parties to bring or defeat an action.

B. Discussion of Core Recommendations

We have developed the new Alberta Act from two general conclusions that we have reached from our analysis of limitations law. The first conclusion is that all claims should be brought as soon as reasonably possible. The limitations period should not, however, be unduly short. A limitations system must give claimants a reasonable period of time after the occurrence of events to discover whether or not their rights have been violated by the conduct of others, to negotiate settlements and, if need be, to seek remedies. The second conclusion is that an absolute or ultimate limitation period applicable to all claims, one which is not subject to uncontrolled exceptions, and which is not unduly long, is required to achieve the objectives of a limitations system. The limitations system must require that claims be brought within a period of time which is reasonable in terms of the interests of both society and defendants. In particular, it must not tolerate an excessive risk that claimants advancing stale claims will obtain remedies when their rights have not been violated by defendants who have lost the capacity to defend themselves.

(1) Limitation Periods

With one exception,[22] all claims subject to the new Alberta Act will be governed by two limitation periods, one known as the "discovery period" and the other as the "ultimate period". The defendant will be entitled to a limitations defence, when whichever of these

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22 The exception, for a claim based on a judgment or order for the payment of money, is discussed at pp. 41-42.

periods expired first. Because all claims subject to the new Alberta Act will be governed by both periods, problems of characterization and categorization will be eliminated for these claims.

(a) The Discovery Rule

The discovery limitation period will begin when the claimant either discovered, or ought to have discovered, specified knowledge about his claim, and will extend for 2 years. We believe that, for the great majority of claims, this period will expire first. Because this period will depend on a discovery rule, the problems associated with accrual rules will be tremendously reduced.

(i) Commencement of discovery period

The discovery period will begin when the claimant discovers

(1) that the injury for which he seeks a remedial order had occurred,

(2) that the injury was to some degree attributable to conduct of the defendant, and

(3) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding.

As to the first requirement, the discovery period will commence not at the time of the event, but at the time of discovery of the injury. Therefore, it may begin at different times for different injuries for which remedial orders are sought. It is possible that there will be separate claims based on different injuries arising from the same event.

As to the second requirement, the discovery period will not begin until the claimant first knew that his injury was to some degree attributable to the conduct of the defendant. In other words, the discovery period may begin at different times against different defendants.

As to the third requirement, the discovery period will not begin until the claimant first knew that his injury was sufficiently serious to have warranted bringing a proceeding, that is, there must be relatively serious harm. This criterion will protect litigants from incurring unnecessary legal expenses, and bringing unnecessary legal action. The discovery rule will, in effect, invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the cost-benefit analysis which would be reasonable for the actual claimant.

(ii) Length of the discovery period

The discovery rule is claimant oriented, for it is designed to adjust to the circumstances of a particular claimant and to give him a reasonable period of time to bring a specific claim. We think that a 2-year discovery period is quite reasonable. The discovery period will not even begin to run until the claimant knew or should have known the three basic facts which trigger its operation, and he will be given 2 more years to consult a lawyer, to investigate the law and facts, to conduct settlement negotiations with the defendant, and to bring an action if necessary.

(iii) Knowledge required

The discovery rule incorporates a constructive knowledge test which charges the claimant with knowledge of facts which, in his circumstances, he ought to have known. This is the reasonable man standard. In the Report for Discussion, we related constructive knowledge to the knowledge which the claimant, in his circumstances and with his abilities, ought to have known, and rejected the reasonable man standard. We have since changed our view.

(iv) Claims subject to discovery rule

We believe that the discovery rule should be applicable to all claims governed by the new Alberta Act. Our principal reason is based on justice to the claimant. If the primary concern for categorizing claims under the traditional limitations approach is the claim which the claimant could not reasonably have discovered, as we think it is, we do not believe that a statute can fairly discriminate simply because there will be more claims in one possible category than another.

Another extremely important reason is that the new Alberta Act should be as simple and comprehensible as reasonably possible. If only some claims were subject to a discovery rule, these claims would have to be defined. This would present categorization problems in drafting the legislation, and characterization problems for lawyers and the courts in applying it. In addition, the claims which are not subject to a discovery rule would have to be governed by fixed limitation periods beginning with the accrual of the particular claim. As to these claims the problems associated with the accrual rules, categorization and characterization would remain. It is these problems which have been primarily responsible for making limitations law so complex and which we wish to avoid in the new Alberta Act.

(v) Special cases

The new Alberta Act specifically defines when the discovery rule will begin to run against a successor owner of a claim, a principal, and a personal representative of a deceased person as a successor owner of a claim.

(b) The Ultimate Rule

(i) The Rule

The second of the two basic limitation periods, the ultimate period, will extend for 15 years, usually from the accrual of a claim. In the Report for Discussion we recommended an ultimate period of 10 years. We now think that a 10-year period is too short and would operate unfairly against claimants. Although we do not believe that the ultimate period will strike down many claims, when it is the applicable period there may be accrual rule problems.

(ii) Special cases

The new Alberta Act specifies when the ultimate period will begin for a claim or claims resulting from a continuing course of conduct or a series of related acts or omissions, a claim based on the breach of a duty of care, a claim based on a demand obligation, a claim under the Fatal Accidents Act, and a claim for contribution.

(c) Raising defence

The defendant will be required to assert his limitations defence; it will not take effect automatically. The expiration of the limitation period will not ordinarily expunge the legal right. The expiration of this time will simply give the defendant immunity from liability by providing him with a defence to a claim, as it does under the existing law.

(d) Comment

We believe that a new Alberta Act based on our recommendations will be much fairer to claimants because all claims to which the Act applies will be subject to a discovery rule. However, the discovery rule will also benefit defendants, for in many cases claimants will have to bring claims sooner than under the present system if they have acquired the required knowledge. The ultimate period will benefit defendants. We believe that an ultimate period is essential for the achievement of the objectives of a limitations system.

(2) Acquiescence or Laches

(a) In general

The courts will be authorized to deny equitable relief to a claimant even when the applicable limitation period under the Act has not expired. However, the courts will not be granted any other discretion to shorten or lengthen an applicable limitation period.

(b) Breach of trust

The present Alberta Act, in ss. 40 and 41, specifically excepts certain claims based on breach of trust from its application. We considered whether to except claims based on breach of trust from the new Alberta Act, with the result that doctrines of laches and acquiescence would continue to apply to claims against a person who owes a fiduciary duty to another.

Our rule of thumb has been to include claims within the general limitations scheme unless there is convincing reason to make an exception. One of our members argued strongly that to apply fixed limitations periods to claims based in equity that are excepted from the present Alberta Act would be to effect a fundmental policy change that goes further than we should recommend. His argument is based on the acceptance of a difference in kind between claims originating at law and claims, or at least certain claims, originating in equity. In his words:

> Repose clearly warrants statutory limitation of claims at law. Such claimants should not be permitted endlessly to threaten litigation. In this context, it is only just to 'balance' the so-called strategies at law and in equity so that the defendant receives repose and the claimant is denied the right to litigate only after a reasonable time from the discovery of the claim.
>
> But to 'balance' such strategies for the parties in equity so that laches is retained for the defendant by s. 4 of the new Act but denied the claimant by the omission of s. 41(2) of the present Act is to do injustice to the claimant. His right to litigate is denied for no good reason. The repose deserved by the defendant in equity is fully served by the defence of laches. Equity does not arbitrarily end rights by mere delay. Thus, 'balancing' in this context gives the defendant in equity a windfall immunity at the expense of the claimant in equity whose property is unjustly retained by the defendant.
>
> Such defendant can easily end disturbance of his repose by threats of litigation, before laches applies, by undoing the unjust enrichment he enjoys. Only a philosophy of mere utility would suggest that a trustee in breach of the duty of loyalty deserves peace of mind in wrongly retaining trust property before laches gives him a defense, and then give him that repose by giving him the trust property.

The majority of us have not been persuaded that this argument should prevail. We do not see any fundamental difference between, for example, a breach of promises made under contract, and a breach of conditions imposed by trust. The discovery limitations period we propose is based on the discovery limitations principle that comes from equity and applies to breach of trust cases under the existing law. It will give trust beneficiaries a reasonable period of time within which to pursue their claims. True, our recommendations impose a fixed period of 2 years from discovery on the application of this principle. We do not think that this will unduly burden trust beneficiaries any more than it will persons entitled to a remedy for other reasons. The ultimate limitation period we recommend will give trustees the same protection that it gives to other potential defendants. It will protect them from the prejudicial risks of stale evidence, guard them from incurring unreasonable economic costs, help assure them of legal decisions based on current socio-economic values, and enable them to look forward to eventual peace and repose.

The special provisions recommended in the new Alberta Act will cover a good many cases that are the subject of exception from the present Alberta Act. Where the trustee has fraudulently concealed the fact of the injury the ultimate limitation period would be suspended indefinitely. Furthermore, a breach of fiduciary duty that is continuous would give rise to successive claims. Again, the effect would be to suspend the ultimate limitation period indefinitely. Room exists for counsel to argue that the facts of a particular case bring it within one or another of the special provisions in the new Act.

(3) Application of Act

(a) Remedial orders

In a civil proceeding, a court is engaged in three distinct processes. They are: remedial orders, declarations and enforcement orders. The limitations periods in the new Alberta Act apply when a claimant seeks a remedial order in respect of a claim. The Act defines a "remedial order" to mean a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty to pay damages for the violation of a right.[23] Declarations and enforcement orders are expressly excluded.

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23 A remedial order is either performance-oriented or substitutionary in nature. That is to say, it either compels a defendant to comply with his duty to the claimant or to compensate the claimant, in money, for the violation of his right by the defendant. The court order creates a new right-duty relationship between the claimant and defendant. Granting civil judicial remedies is one of the most important functions of the courts under the judicial system.

(b) Inherent exclusions

Some types of claim should not be subject to any limitation provision. Such claims are excluded from the application of the new Alberta Act, either inherently or expressly, and could therefore be brought at any time. Because of these claims, there would still be some characterization and categorization problems in the new Alberta Act.

The exclusion of some claims is implicit in the definition of a remedial order. Examples of inherently excluded claims are: claims that are not subject to the legislative jurisdiction of Alberta, claims made in criminal proceedings, claims made in administrative proceedings, and claims made in interlocutory proceedings taken after a claim for a remedial order is before the court.

(c) Express exclusions

Several types of claim are expressly excluded from the application of the Act.

(i) Declarations

A declaration defines right-duty relationships, clarifies them and may recognize the existence of a right-duty relationship sufficient to justify granting a remedy. Declarations should not be subject to a limitations system. In the Report for Discussion, we excepted them on the basis that a declaration merely declares rights. While we continue to recommend this exception, we think it only fair that we do so recognizing the potential of the declaration for use to circumvent the limitation periods set out in the Act. Declarations constitute a growth area in the law, rendering the effect of their exception from the Act something of an unknown factor. For example, what would be the result were a claimant to seek remedial relief that is ancillary to a declaration? The definition of "remedial order" in s. 1(i) of the Act is the control mechanism.

(ii) Enforcement orders

A remedial order is not self-executing. A court may therefore be required to issue further orders and writs for the purpose of enforcing the remedial order. Enforcement orders are excluded from the application of the new Alberta Act, although the Act does provide a limitation period within which proceedings must be brought to renew a judgment for the payment of money for the purpose of enforcement.[24]

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24 For discussion, *see* pp. 41-42.

(iii) Judicial review

Claims requesting judicial review are expressly excluded for two reasons: first, because they are declaratory rather than remedial in effect and, second, because, unlike claims in ordinary civil proceedings, they have a public law character.

(iv) *Habeas corpus*

To impose a time limitation curtailing access to the court for the purpose of determining the legality of a person's detainment by another would be utterly offensive to this ancient and renowned remedy. The exclusion is stated independently from the exclusion of claims for judicial review because, unlike other relief available against a public authority, the remedy of *habeas corpus* lies against anyone.

(v) Possession of real property

The new Alberta Act specifically excepts claims based on the adverse possession of land from the operation of the 2-year discovery limitation period. However, the 15-year ultimate limitation period will still apply. The *Law of Property Act*, s. 60, will be subject to the same exception. In the Report for Discussion we recommended that claims, whether legal or equitable, for the possession of property, whether real or personal, be excluded from the coverage of the new Alberta Act, for we wished to eliminate the acquisition of ownership through adverse possession. We continue to be of the view that the substantive law governing adverse possession is in need of reform. However, we now think that that reform should be addressed in the context of another project, and have withdrawn the recommendation for an exception in the context of this report.

In the Report for Discussion, we also recommended that claims with respect to certain other possessory interests in property, real or personal, be excepted from the new Alberta Act. We are no longer satisfied that the reasons given provide a sufficient basis for recommending exceptions for these claims. The claims excepted were:

1. adverse possession of personal property - we now see no reason why the owner of personal property should not be required to claim it before the expiration of the discovery period or the ultimate period, whichever first expires;

2. the realization of a security interest by a security party in rightful possession of secured property - as it would be uncommon for a security holder to hold on to the security, and more uncommon still for the security holder to need the court to help him dispose of it, no exception is required;

3. redemption of secured property by a debtor - the right to redeem is protected by our recommendations for claims added to a proceeding;

4. compliance with a duty based on an easement, a *profit a prendre*, a utility interest, or a restrictive covenant attached to and running with land - the ultimate period would not apply because the rights described are continuous such that breach of the duty to comply would give the complainant a continuous succession of claims; and

5. the revision of a register under the *Land Titles Act* - we see no reason to single out this particular administrative function for exception from the Act, especially when judicial review of administrative action is included as a general exception.

(vi) Adverse possession of real property owned by the Crown

At common law, the right to take title to land by adverse possession cannot be claimed with respect to land owned by the Crown. Because the new Alberta Act expressly binds the Crown, it stipulates an exception for this situation.

(vii) Limitations provisions in other enactments

We have noted a distinction between the coverage of the general limitations statute and the many limitations provisions in specialized statutes dealing with particular types of claim that also form part of the limitations system. Limitations provisions in specialized statutes are excepted from the new Alberta Act.

(4) Concealment

The ultimate period will be suspended for fraudulent concealment by the defendant of the fact that the injury had occurred. The recommendation in the Report for Discussion referred to knowing and wilful concealment. We have substituted fraudulent concealment to avoid the problems of proof which would accompany the use of the words "knowing and wilful". We have also narrowed the scope of the recommendation by restricting to fraudulent concealment by the defendant to the fact "that the injury had occurred". The recommendation in the Report for Discussion would have suspended the ultimate period for concealment by the defendant of the fact that the injury had occurred, that it was to some degree attributable to the defendant's conduct, or that it was sufficiently serious to have warranted action by the claimant. In our view a provision framed in the wider terms of the Report for Discussion would place an undue burden on the defendant to anticipate the state of mind and knowledge of potential claimants.

(5) Persons under Disability

The limitation periods will not operate while a person is under disability, whether the person is under disability when his claim accrues (prior disability) or came under disability after his claim accrued (subsequent disability). In making this recommendation, we depart from the present Alberta Act which suspends the operative limitations period for a prior disability but not for a subsequent disability.

We also recommend that there should be no time limit on the operation of the suspension, that is, the period of suspension should match the period of disability. Here, we depart from the recommendation in the Report for Discussion which would have limited the period of suspension of the ultimate period to a maximum of 10 years. The result would have been that the discovery period would never expire while a person is under disability, but the ultimate period would have been limited to 20 years from the accrual of a claim; it would have had 10 years of normal operation and a possible suspension of 10 years.

We have modified the definition of a "person under disability" where the person is an adult. In the Report for Discussion, we recommended adoption of the definition, in s. 25 of the *Dependent Adults Act*, that an adult under disability is an adult who is "unable to make reasonable judgments in respect of matters relating to all or any part of his estate". The definition we now recommend employs the words "unable to make reasonable judgments in respect of matters relating to the claim". In connecting the disability to the particular claim, the new definition recognizes, as does the common law, that a person may be competent for one purpose (e.g. to marry), but not for another (e.g. to make a will).[25] It opens the way to flexible interpretations appropriate to specific facts and circumstances (e.g. where sexual assault in childhood is alleged by an adult whose memory of the incident or incidents has been psychologically blocked for many years).

(6) Claims Added to a Proceeding

When a proceeding has been started by a timely claim, the parties will often wish to add further claims which are subject to a limitations defence. If the added claims are related to the conduct, transaction or events described in the original pleading in the proceeding, it will often be desirable, for reasons of justice and efficiency, to have them tried in a single proceeding with the original claims. The new Alberta Act will deprive a defendant of a limitations defence he would normally have to an added claim in the

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25 The *Dependent Adults Act* recognizes the same concept by requiring orders of partial guardianship, separate from trusteeship, where a person is unable to make reasonable judgments in respect of matters relating to his or her person.

situation we have described, but only if requirements designed to give the defendant alternative limitations protection have been satisfied.

(7) Agreement

Variation of the limitation provisions by agreement between the persons themselves will be permitted in accordance with normal contract law. That is to say, whatever limitation period is used, if the parties are in fact conducting settlement negotiations, or if a creditor wishes to allow a debtor additional time for payment, the parties will be able to use an agreement, with minimal cost, to avoid unnecessary litigation.

(8) Acknowledgment and Part Payment

The law that applies to acknowledgments and part payments under the present Alberta Act will not change. Rather, the new Alberta Act attempts to restate that law in a more organized and comprehensible manner, and hence to clarify it.

(9) Conflict of Laws

The limitations law of Alberta will apply when a claim is brought in Alberta, notwithstanding that the Alberta court will decide the claim according to the substantive law of another jurisdiction.

(10) Judgment for the Payment of Money

In the only limitation period specified that is unrelated to the discovery and ultimate limitation periods, the new Act requires a claimant to seek a remedial order in respect of a claim based on a judgment or order for the payment of money within 10 years after the claim arose. If he does not, the new Act gives the defendant immunity from liability in respect of the claim. As in the case of the main limitation provisions, the defendant must plead the defence to obtain the immunity. The effect is to continue the requirement, in s. 4(1)(f) of the present Alberta Act, that action on a judgment or order for the payment of money be brought within 10 years after the cause of action on the judgment arose.

Our final recommendation differs from the tentative recommendation made in the Report for Discussion. There, we recommended that the new Act should not specify any limitation period within which action on a judgment for the payment of money must be brought. Our reasons were that:

(i) the objectives of the limitations system are satisfied if the claim that leads to the original judgment is brought within the appropriate limitation period; and

(ii) the renewal of a judgment has to do with its enforcement, the limitation of enforcement is a procedural matter and it should thus be in the Rules of Court.

We departed from our general principle that time limits associated with enforcement lie outside the limitations system, and recommended that:

(i) there should be only one method of renewing a judgment for purposes of enforcement,

(i) that method should be provided in modified Alberta Rules 331, 355 and 356, and

(ii) the common law action on a judgment should be abolished.

Under the tentative recommendations, the Rules would have been amended to provide that a judgment could be enforced provided that the enforcement procedure is commenced within 10 years after the date of the judgment.

Having reconsidered our position, we are now of the view that:

(i) collecting on a judgment (which is procedural) should not be confused with pursuing the cause of action created by a judgment (which is what the limitations statute deals with),

(ii) it may be that one method of renewing a judgment (either under the Rules of Court or by action on a judgment) for the purpose of enforcing it is to be preferred to the other and that one should be abolished, but this is a matter for consideration at another time,

(iii) abolishing the common law action on a judgment would interfere with the enforcement of judgments or orders granted in jurisdictions that are not recognized under reciprocal enforcement legislation in Alberta.[26]

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26 *Reciprocal Enforcement of Judgments Act*, R.S.A. 1980, c. R-6; *Reciprocal Enforcement of Maintenance Orders Act*, R.S.A. 1980, c. R-7.1. These Acts do not provide a sufficient enforcement mechanism because their application is restricted to judgments granted in reciprocating jurisdictions. In fact, judgments granted by courts in some Canadian provinces are not recognized. Moreover, the conditions that must be met for registration can be difficult to satisfy.

C. Other Matters

(1) Transitional

The new Alberta Act will apply to a claim made in a proceeding commenced after the Act comes into force. A defendant will be deprived of his immunity where a claim is commenced in time to satisfy the present Alberta Act and is also commenced within 2 years from the date the new Alberta Act comes into force. The effect is to give the claimant 2 years, the period allowed by the discovery rule, after the commencement of the new Alberta Act within which to bring a known claim.

This is a departure from the recommendations in the Report for Discussion. Under those recommendations, a claim that arose under the present Alberta Act would have been protected if the proceeding was commenced in time to satisfy the later of the limitation provisions in the present Act or the new Act. A defendant would have been protected if he would have been entitled to an immunity to a claim under the present Alberta Act.

(2) Interpretation

The new Alberta Act is silent on matters of interpretation. The Report for Discussion made recommendations for the inclusion of two provisions on the interpretation of the new Act. One provision would have expressly permitted the court to consider the Institute report in ascertaining the meaning of any provision in the Act. The second provision would have directed the court to adopt an interpretation which promotes the general legislative purpose of the Act. We no longer see any efficacy in the inclusion of these provisions which merely require restate established rules of statutory interpretation.

(3) Consequential Amendments

(a) Prescription of light

The new Alberta Act provides that section 50 of the present Alberta Act be transferred to the Law of Property Act.[27] Section 50 provides that, although Alberta received the common law, it never received the doctrine of prescription insofar as the rights described in that section could have been acquired by prescription.

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27 Section 50 says:

> No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.

The doctrine of prescription has its origin in the common law. It is extremely complex, and although it is not properly part of limitations law, it operates in much the same way. We do not wish to consider this subject, on the merits, in this report, for we believe the issues which would be raised concern substantive property law rather than limitations law.

(b) Repeal of the present Alberta Act

The new Alberta Act introduces an entirely new approach to limitations law. As such it replaces the present Alberta Act. The new Act therefore provides for the repeal of the present Act.

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December 1989

PART IV - ANNOTATED MODEL LIMITATIONS ACT

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Note

A Model Act

1. This Act is a "model" limitations act because it develops a new approach to limitations law. Specific references in the annotation are to the law of Alberta because we are an Alberta Law Reform Institute and our recommendations are intended primarily for enactment in Alberta.

Terminology

2. Because the Model Act adopts a new approach it adopts a new terminology. The words are used in a generic, non-technical sense. The Act speaks of a "claim" (rather than a cause of action) to denote the substantive right that may entitle a person to receive a remedy in a civil proceeding before a court, of a "claimant" (rather than a plaintiff or applicant) who seeks a "remedial order" in respect of a "claim", and of a "defendant" (which may include a third party) as the person against whom a remedial order is sought.

Scope

3. The Act is a general limitations statute. Although it is generally comprehensive in its coverage, it does not embody the entire limitations system, and limitation provisions in specialized statutes dealing with particular types of claim are excluded. A comprehensive list of those provisions is contained in the *Alberta Limitations Manual* published by Butterworths (1983). A list of those provisions in other statutes in Alberta that apply to civil judicial claims is included as Appendix B to this report.

4. The concept of a "remedial order" is central to the application of the Act. A "remedial order" is, by definition, restricted to a claim requesting the *enforcement* of a right-duty relationship. This is because the purpose of the Act is to limit the time available to a claimant for bringing a claim that requires a defendant to do something. Certain exclusions are implicit in the definition. For example, declarations are excluded because they merely define and recognize existing rights.

A New Limitations Strategy

5. The Act introduces a new limitations strategy. The new strategy relies to a significant degree on the limitations strategy in equity in which the limitation period commences at the time of the discovery of a claim by the claimant. In this, it departs from the approach traditionally taken in general limitations statutes which is based on the strategy at law. The new strategy continues the direction of the reform movement currently evident in judicial and statutory reforms.

Two Limitation Periods

6. All claims subject to the Act are governed by the same two concurrent limitation periods. This is a departure from the traditional approach to limitations legislation which expressly describes and assigns a limitation period in the statute to certain types of claim (e.g. in tort, in contract, against hospital boards).

7. One limitation period (the "discovery period") begins when the claimant either discovered, or ought to have discovered, specified knowledge about his claim and extends for 2 years.

8. The other limitation period (the "ultimate period") extends for 15 years, usually from the date of accrual of a claim.

9. Because all claims subject to the Act are governed by both periods, problems of characterization and categorization associated with the traditional approach to limitations law under the strategy at law are eliminated for these claims.

10. Some characterization and categorization problems will exist under the Act because some categories of claim are excepted from it. Not being subject to any limitation provision, claims in the excepted categories can be brought at any time.

11. In some cases the general rule must be followed through particular applications, for example, the special limitation commencement rules in ss. 3(2) and (3), fraudulent concealment in s. 5, and persons under disability in s. 6.

Effect of Limitation Periods

12. The defendant is entitled to a limitations defence when whichever of the two limitation periods expires first. A successful defence gives the defendant immunity from liability under the claim. It does not expunge legal rights.

13. The defence must be pleaded. Immunity from liability is not conferred automatically.

Interpretation

14. Because the approach is new, upon its introduction into force the Act will require lawyers and judges to grapple with its scope and specific applications. Definitive answers to questions about the application of the Act to given fact situations will not always be possible. Until issues regarding interpretation are settled, the Act will provide lawyers with a unique and challenging opportunity to present creative arguments based on principle.

[Section 1 - Definitions]

1 In this Act,

(a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;

(b) "claimant" means the person who seeks a remedial order;

(c) "defendant" means a person against whom a remedial order is sought;

(d) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;

(e) "injury" means

(i) personal injury,

(ii) property damage,

(iii) economic loss,

(iv) non-performance of an obligation, or

(v) in the absence of any of the above, the breach of a duty;

(f) "law" means the law in force in the Province, and includes

(i) statutes,

(ii) judicial precedents, and

(iii) regulations;

(g) "limitation provision" includes a limitation period or notice provision that that has the effect of a limitation period;

(h) "person under disability" means

(i) a minor, or

(ii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim;

(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, and excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order,

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute, or

(iv) *habeas corpus*;

(j) "right" means any right under the law and "duty" has a correlative meaning;

(k) "security interest" means an interest in property that secures the payment or other performance of an obligation.

Comment

Clause 1(a) - Claimant

1. The word "claim", defined in cl. 1(a), is substantive in meaning, not procedural. That is to say, it refers to the facts and circumstances which give rise to the alleged right to a remedy, not to the process by which the claim is made.

Clause 1(ab - Claimant

1. The word "claimant", defined in cl. 1(b), would include a plaintiff suing for monetary damages. It would also include a plaintiff suing for specific performance or any other order for non-monetary relief to enforce a duty owed by a defendant in respect of the right of a claimant, as can be seen from the definition of "remedial order" in cl. 1(i). *See* the comments on cl. 1(i) and s. 3 for a discussion of the exceptions from the application of the Act.

Clause 1(c) - Defendant

2. The word "defendant", defined in cl. 1(c), would include third party defendants.

Clause 1(d) - Enforcement order

3. Functionally, an enforcement order, defined in cl. 1(d), is made during the fourth of four distinct processes in which a court is engaged in a civil proceeding. The first three processes are: (1) the identification and definition of the right-duty relationship upon which the claim is based; (2) the determination whether a breach of a relevant duty has occurred; and (3) the selection of an appropriate remedy and grant of a remedial order.

4. No further definition of an enforcement order has been attempted because: (1) the types and specific characteristics of these orders may be varied over time; (2) they are the subject of extensive provisions in the Alberta Rules of Court; and (3) the general reference to a claim for the enforcement of a remedial order offers an adequate and practical solution.

Clause 1(e) - Injury

5. Cl. 1(e) defines "injury" broadly, in keeping with the generic meanings to be attributed to words used in the Act. "Injury" is defined for purposes of the discovery limitation rule stated in cl. 3(1)(a), and ss. 5(1) on fraudulent concealment.

Clause 1(f) - Law

6. Cl. 1(f) defines "law" for purposes of the definition of "right" in cl. 1(j), ss. 2(1) on the application of the Act, cl. 7(3)(b) and cl. 7(4)(b) on claims added to a proceeding, s. 12 on conflict of law rules, and the transitional provision in ss. 13(2).

Clause 1(g) - Limitation Provision

7. Cl. 1(g) defines "limitation provision" for purposes of the express exlusion from the application of the Act stated in cl. 2(2)(b).

Clause 1(h) - Person under Disability

8. Cl. 1(h) defines the category of "persons under disability" to include all minors and some adults. The Act gives persons under disability the benefit of a suspension of the specified limitations periods: *see* ss. 3, 6. In the case of the discovery limitation period this is because the assumption that the claimant has the ability to make reasonable judgments is not accurate for all claimants.

9. *Minors*. The general policy with respect to minors is carried forward from the *Limitations of Actions Act*, R.S.A. 1980, c. L-15, cl. 1(c) (hereafter "the present Alberta Act"). (A minor is defined in the *Age of Majority Act*, R.S.A. 1980, c. A-4, as a person under 18 years of age.)

10. *Adults under disability*. The general policy with respect to adults is also carried forward from the present Alberta Act. However, "unsoundness of mind" has been redefined and the suspension now applies to "an adult who is unable to make reasonable judgments in respect of matters relating to the claim". The words "unable to make reasonable judgments", describing the condition, are borrowed from the *Dependent Adults Act*, R.S.A. 1980, c. D-32, s. 25. The words of further qualification, "in respect of matters relating to the claim", connect the disability to the particular claim. The concept is similar to the concept, at common law, of mental incompetence (or incapacity), and to the concept, in the *Dependent Adults Act*, of partial guardianship separate from trusteeship. Both the common law and the *Dependent Adults Act* recognize that a disability may affect some but not all aspects of a person's ability to function mentally.

11. Adoption of the language in the *Dependent Adults Act* helps to ensure the maintenance of an appropriate definition that will be reviewed from time to time in

the light of revised social and medical standards.

Clause 1(i) - Remedial order

12. Three features of the definition of "remedial order", in cl. 1(i), should be noted. First, the word "order" includes a judgment or an order. Second, the order must be made by a court in a civil proceeding. Third, the order must *enforce* a duty owed by a defendant in respect of a right of the claimant.

13. Remedial orders fall into two categories. The order may be performance oriented, requiring a defendant to comply either with an affirmative duty to do something, or with a negative duty to refrain from doing something. Alternatively, the order may be substitutionary in nature, requiring a defendant to pay damages for the violation of a right in substitution for the performance of a duty which is no longer either possible or feasible. There is no difference between the two categories as a matter of application. That is, the two categories are treated in exactly the same way.

14. The definition contains four express exclusions.

Subclause 1(i)(i) - Express Exclusion of Declarations

15. Subcl. 1(i)(i) expressly excludes a claim for a declaration of rights and duties, legal relations or personal status from the coverage of the Act. The exclusion of a claim for a declaration is stated explicitly because of the critical importance of the exclusion.

Function of Declaration

16. A declaration is excluded because, strictly speaking, it has no creative effect: it does not order anyone to do, or to refrain from doing, anything. Rights and duties, legal relations and personal status exist under the law without any necessary reference to the courts, and persons usually comply with their duties without judicial coercion. A claim for a declaration may be brought where persons have a genuine dispute as to the scope of their respective rights and duties, legal relations or personal status. The interested persons may leave the court in peace and comply with their duties as defined in the declaration without further resort to the judicial process. A declaration simply recognizes and defines rights and duties, legal relations or personal status that already exist.

Types of Declaration Excluded

17. *Declaration of Rights and Duties.* The Act does not apply where the claimant seeks a declaration of rights and duties based on contract, trust, restitution, property or statute, e.g. the interpretation of a legal document such as a mortgage, a lease, a contract, a will or a trust; or a declaration of the priority of interests in land under the Land Titles Act. Rights and duties based on contract, trust, restitution, property and statute

18. *Declaration of Legal Relations.* The Act does not apply where a claimant seeks a declaration of legal relations (e.g. the relationship between a person with a power (an agent) and a person under a liability to have his rights and duties altered if the power is exercised (the principal); or the relationship between a person who has gained an immunity from liability under a power and a person under a disability to exercise the power).

19. *Declaration of Personal Status.* The Act does not apply where a claimant seeks a declaration of personal status (e.g. a declaration of personal status resulting from marriage, divorce or parentage).

Effect of Exclusion

20. The precise scope and effect of the exclusion of declarations from the

application of the new Act is a matter to be determined through experiment and experience. Used creatively, the declaration may provide an avenue by which to avoid the limitations periods in the Act. That is because, strict legal theory notwithstanding, a declaration often yields practical benefits.

21. Courts have repeatedly observed, "the scope of a declaratory proceeding is a wide legal remedy" that is particularly to be valued for the opportunity it gives to courts to award appropriate forms of consequential relief: *Sommers* v. *City of Edmonton* [1978] 5 W.W.R. 205 at 221, *per* Haddad J.A. According to the Supreme Court of Canada, the action for declaratory relief is "neither constrained by form nor bounded by substantive content": *Solosky* v. *The Queen* [1980] 1 S.C.R. 821, *per* Dickson J. (now C.J.C.). (The judgment in *Solosky* reviews what is meant by a "real dispute".)

22. A declaration may affect the ordering of affairs and have other potential and remedial effects - hence the expression "declaratory relief". The disputes giving rise to traditional actions for declaration (partition of property, marital status, cloud on title) are real, present disputes that call for judicial settlement. Threats to social disequilibrium can be staved off by making rights of property or status secure before any breach has actually occurred. A purchaser of land in Alberta has been granted a declaration that he is the owner of mines and minerals and, as a result, the effect of an intervening transaction has been negated. An insured person under a policy has successfully sought a declaration that the policy was in full force and that the insurer's refusal to accept a renewal premium was wrongful. A declaration of the invalidity of assessments has had the effect of substantially reducing the applicant's assessment.

23. It will be a question to be decided in the particular case whether relief supplementary to a declaration comes within the definition of "remedial order", and hence within the scope of the new Alberta Act. S. 11 of the *Judicature Act*, R.S.A. 1980, c. J-1, refers to the possibility, though not the necessity, of relief consequential to a declaration, thereby suggesting that the court's declaratory powers are more extensive than simply the issuance of judgments that, strictly speaking, are only assertive and not coercive. The section provides that:

> 11. No proceeding is open to objection on the ground that a judgment or oder sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

24. The only time constraints on a declaratory application seem to fall under general equitable principles, although there is some scholarly controversy about whether the discretionary bars to equitable relief apply to declaratory actions. Courts have expressly sanctioned the use of declaration as an alternative, more general procedure in the face of a time-barred, specific one: *see* e.g. *Sommers* v. *City of Edmonton*.

Subclause 1(i)(ii) - Express Exclusion of Enforcement Orders

25. Subcl. 1(i)(ii) expressly excludes a claim for an enforcement order from the coverage of the Act. As in the case of a claim for a declaration, the exclusion is stated explicitly because of its critical importance.

26. There are two reasons for the exclusion. First, an enforcement order will not be issued unless the initial claim was brought within the prescribed limitation period. The objective of the Act, which is to ensure that claims requesting remedial orders are brought

within a reasonable time, will therefore have been satisfied. Second, an enforcement order is procedural in nature. As such, any limitation of the time available to a claimant to request an enforcement order is a matter for the Rules of Court.

Subclause 1(i)(iii) - Express Exclusion of Judicial Review of Administrative Proceedings

27. Subcl. 1(i)(iii) expressly excludes a claim requesting judicial review of the decision, act or omission of a public authority (i.e. a person, board, commission, tribunal or other body in the exercise of a power conferred by statute) from the Act.

28. The exclusion embraces claims for relief brought by an application for judicial review under Part 56.1 of the Alberta Rules of Court. An application for judicial review may include a claim for any relief that the applicant would be entitled to in any one or more of proceedings for an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus, or for declaration or injunction. A claim for relief by way of an order in the nature of *habeas corpus* is excluded specifically in subcl. 1(i)(iv).

29. There are two reasons for excluding claims for judicial review. The first reason is that the remedies used in judicial review are declaratory rather than remedial in effect in that a claim for judicial review is brought for the purpose of testing the "legality" of the conduct of the public authority whose decision, act or omission is the subject of complaint. In other words, the claim is brought to determine whether conduct was within the jurisdiction conferred by statute and whether the power was exercised without abuse.

30. The second reason is that, unlike claims in ordinary civil proceedings, claims for judicial review have a public law character. The powers exercised by public authorities frequently affect large segments of the public and the remedies granted on judicial review may result in a realignment of rights and duties of many persons. The value judgments which must be made in developing limitations provisions applicable to claims requesting judicial review are therefore significantly different from the value judgments which a limitations statute reflects in connection with claims for remedial orders in ordinary civil litigation. A limitations systems for claims requesting judicial review of the decision, act or omission of a public authority should therefore be developed separately and contained in either the Rules of Court or a specialized statute.

Subclause 1(i)(iv) - *Habeas corpus*

31. Subcl. 1(i)(iv) expressly excludes a claim requesting *habeas corpus* from the Act.

32. The ancient remedy of *habeas corpus* lies to compel the production of the body of a person detained by another to determine the legality of the confinement. It has been described as "the most renowned contribution of the English common law to the protection of human liberty" (S.A. deSmith, *Judicial Review of Administrative Action* 4th ed. J.M. Evans ed. 1980, at 596). The right to claim the remedy is protected by section 11 of the *Canadian Charter of Rights and Freedom* (*Constitution Act, 1982*) which provides that

> . . . everyone has the right on arrest or detention . . . to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

33. The reason for the exclusion is obvious: any time limitation would be utterly offensive to *habeas corpus*.

34. The exclusion is stated independently from the exclusion of claims for judicial review because, unlike other relief available against a public authority, the remedy of *habeas corpus* lies against anyone.

Clause 1(j) - Right

35. Cl. 1(j) defines the word "right" for the purposes of the definition of "remedial order" in cl. 1(i).

Clause 1(k) - Security Interest

36. Cl. 1(k) defines "security interest" for purposes of s. 9(1) as an interest in property that secures the payment or other performance of an obligation, that is, property that serves as an auxiliary security for a personal obligation. The definition is based on the definition of "security interest" in the *Personal Property Security Act*, R.S.A. 1988, c. P-4.05, cl. 1(1)(qq).

[Section 2 - Application]

2(1) Except as provided in subsection (2), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

(a) the remedial order is sought in a proceeding before a court created by the Province, or

(b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.

(2) This Act does not apply where a claimant seeks:

(a) a remedial order based on adverse possession of real property owned by the Crown, or

(b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

(3) The Crown is bound by this Act.

Comment

Subsection 2(1) - Scope of Application

In General

1. Ss. 2(1) describes the coverage of the Act. As is usual in conventional limitations statutes, the coverage is generally comprehensive.

Claims Included

2. *Alberta Jurisdiction*. The claim must be subject to the legislative jurisdiction of Alberta. That jurisdiction includes any claim which arose under the substantive law of Alberta and which is brought before an Alberta court.

3. *Federal Jurisdiction*. Sometimes provincial limitations law can apply to claims arising under federal legislation or to matters brought before a federal courts, that is a court created by the Parliament of Canada.

a. *Federal law*. Any claim which arose under substantive federal law and which is brought before an Alberta court is, by express reference, subject to the Act to the extent that the Act can be made applicable to it. The result is that no limitations hiatus can exist because Alberta has failed to assert a legislative power over a claim which is not in fact subject to limitation provisions under federal law. (Some areas of law are subject to exclusive federal jurisdiction. Although Parliament can subject claims in these areas to applicable provincial limitations law, the extent to which it has

done this is sometimes uncertain. In other areas of law there may be dual legislative jurisdiction, with federal jurisdiction paramount. Federal legislation on a subject would preempt that subject area. However, the extent to which federal legislation on a subject actually occupies an entire subject area, and hence preempts provincial legislation, is sometimes uncertain.)

b. *Federal courts*. Similarly, any claim which arose within Alberta and which is brought before a federal court is, by express reference, subject to the Act to the extent that the Act can be made applicable to it. Again, the result is that a claim which arose in Alberta and which is brought before a federal court will not be in a limitations void because neither jurisdiction applied limitation provisions to it. This is in accordance with the legislative power granted by Parliament to a province in this situation in s. 38(1) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, which provides:

> 38.(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in such province. ...

(For this purpose the crucial point is that the claim arose in Alberta; it makes no difference whether the claim arose under federal substantive law or Alberta substantive law, or whether the claim is brought before a federal court in Alberta or somewhere else in Canada.)

Claims Excluded By Definition of "Remedial Order"

4. Certain categories of claim are excluded from the application of the Act. Some are excluded, either inherently or expressly, by the definition of "remedial order".

Inherent Exclusions

5. The statement, in ss. 2(1), that the Act is applicable whenever a claimant seeks a "remedial order" involves the inherent exclusion of the following four claims.

6. *Claims not subject to the legislative jurisdiction of Alberta*. There is no point in making a law which other jurisdictions will ignore. Where a claim is brought before a court created by another province or by a foreign state, the jurisdictional reality is that the claim is not subject to the legislative jurisdiction of Alberta. Therefore, the Act does not apply.

7. The issue whether or not the Act should apply to a claim that arose under the substantive law of another province or of a foreign state and that is brought before an Alberta court is a conflict of laws issue dealt with in s. 12.

8. *Civil (not criminal) claims*. The Act applies to civil claims. It does not apply to criminal proceedings.

9. *Judicial (not administrative) claims*. The Act applies to claims brought in judicial proceedings before courts. It does not apply to claims in ministerial or administrative proceedings. (The policy considerations relevant to limiting the time available to a claimant for seeking ministerial or administrative action frequently differ from those relevant to judicial claims and are therefore reserved to specific limitations in other statutes.)

10. *Post-claim time periods*. The Act imposes time constraints only to the bringing of claims. Unless a claim subject to the new Alberta Act is *brought* within the applicable limitation period, the defendant will be entitled to assert his immunity from liability under the claim. Time constraints governing procedures to be followed in the course of litigation *after* a judicial action is begun (e.g. time

constraints applicable to interlocutory motions and appeals) are not affected. These procedural time constraints are relevant to the conduct of litigation of a claim already before a court. As such, they do not limit the time available for bringing a claim.

Express Exclusions

11. Four types of proceeding are expressly excluded by the definition of "remedial order": *see* s. 1, comments #15-34.

12. This is a change from the present Alberta Act from which certain claims against trustees are the only ones expressly described and excluded although many claims are probably not intended to be covered.

13. The exclusions do not change the limitations law of Alberta. The new Act simply excludes categories of claims which the courts have customarily held to be beyond the appropriate and intended scope of limitations law in terms of its policy objectives.

14. As to breach of trust, *see* s. 4, comments #4-10.

Section 2(2) - Claims for Remedial Orders Specifically Excluded

15. Two categories of claim are excluded specifically in ss. 2(2).

Clause 2(2)(a) - Adverse Possession of Real Property Owned by the Crown

16. Under the doctrine of adverse possession, an owner of land or a thing loses his right to a remedial order for possession against someone whom the owner has permitted to adversely possess it longer than the prescribed limitation period. The doctrine is not applied against the Crown.

17. The exception of a claim for adverse possession of property owned by the Crown from the Act is needed because of the Act, in ss. 2(3), stipulates that the Crown is bound.

Clause 2(2)(b) - Express Exclusion of Limitation Provisions in Other Alberta Acts

Limitation periods

18. Claims that are subject to limitation periods in other Alberta statutes are expressly excluded from the Act. That is to say, a distinction should be noted between the coverage of the Act as the central statute within the Alberta limitations system and the inclusion of limitations provisions in specialized statutes dealing with particular types of claim.

19. Lawyers and non-lawyers dealing with limitations periods should be wary of problems - or "traps" - that may arise because of the existence of special limitation periods in other statutes. Because the Act is wide (but not exhaustive) in scope, lawyers and claimants may focus on the general limitations provisions in the Act and overlook the relevant provision when it is located in a specialized statute. Conversely, persons relying on statutes which create unique new rights, duties and remedies may focus on the specialized act as the source of all law with respect to a newly created claim and overlook the relevant limitations provision when it is included in the general limitations act.

20. A comprehensive list of limitation provisions in specialized statutes in Alberta is contained in the *Alberta Limitations Manual* published by Butterworths (1983). Most of the limitation provisions listed in the *Manual* are not within the scope of the Act because they have to do with limitation provisions related to: the time of commencement of prosecutions for

provincial offences, proceedings before administrative and ministerial authorities acting under powers conferred by statute, claims requesting judicial review of the decision, act or omission of a public authority, and litigation proceedings after the commencement of a civil judicial action.

21. A list of those limitations provisions in specialized statutes in Alberta that apply to civil judicial claims requesting remedial orders is included as Appendix B. The list was compiled using the *Alberta Limitations Manual* as the primary source.

Notice provisions

22. Lawyers and non-lawyers dealing with limitations periods should also be wary of problems - or "traps" - that may arise because of the existence of notice provisions in other statutes. For example, several Alberta statutes contain provisions requiring a claimant to give a defendant notice of some event as a condition precedent to bringing an action; if the notice is not given within the time and in the form prescribed, and if the claimant cannot satisfy any available exception provisions, the claimant's action will be barred. Notice provisions have the effect of limiting the time for the commencement of an action. As such, they are distinguishable from provisions establishing time limits for procedural steps after an action has been commenced. Where they operate to limit the time available for the commencement of an action they form (and should be treated as) part of the Alberta limitations system.

23. The list of specialized statutes in Alberta included as Appendix B contains the statutes with notice provisions that apply to civil judicial claims requesting remedial orders.

Subsection 2(3)

In General

24. Ss. 2(3) entitles the Crown as defendant to enjoy the benefits of the defence created by the Act, and subjects the Crown as claimant to all of the limitations provisions in the Act.

25. "Crown" means the Crown in all of its capacities.

The Crown as defendant

26. The position of the Crown in right of Alberta as defendant is protected by the *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18, cl. 1(b) and ss. 21(1). "Crown" is defined to mean Her Majesty the Queen in right of Alberta under cl. 1(b) of this Act and under ss. 21(1) the Crown may rely on any defence that would be available if the proceedings were between persons.

27. The position of the Crown in right of Canada or of another province is protected by the basic application rule, as is any governmental entity including a foreign state which does not regard the Crown as the Sovereign.

The Crown as claimant

28. The provision expressly binding the Crown is necessary to satisfy s. 14 and cl. 25(1)(i) of the *Interpretation Act*, R.S.A. 1980, c. I-7. Pursuant to cl. 25(1)(i), "the Crown" means, in substance, the Crown in any capacity, and under s. 14 no enactment is binding on the Crown unless it expressly states that intention. (The Alberta Law Reform Institute is currently considering the immunity conferred on the Crown by s. 14 of the *Interpretation Act*, and may recommend the reversal of the provision to provide that the Crown is bound unless an enactment specifically states that the Crown it does not bind the Crown.)

29. Ss. 2(3) will also prevail over the Crown prerogative described in the maxim *nullum tempus occurrit regi* that exists apart from s. 14, ss. 2(3): *Alberta v. Buys*, (1989) 59 D.L.R. (4th) 677 (Alta. C.A.).

30. The wording in ss. 2(3) is that of the standard Canadian binding clause used in legislative drafting. Constitutionally, this clause will bind the Crown in right of Alberta, and it will bind the Crown in any other capacity insofar as the legislative power of Alberta permits.

31. The provision is also consistent with s. 38 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, which appears to subject any claim brought by the federal Crown, which arose in Alberta, to the Alberta limitations system, whether the claim was brought in the Federal Court or a provincial court in Alberta, and whether the claim is based on federal or provincial law. S. 38 provides:

> (2) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions referred to in subsection (1) [those in force in any province between subject and subject in respect of any cause of action arising in such province] apply to any proceedings brought by or against the Crown [in right of Canada].

[Section 3 - Limitation Periods]

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in his circumstances ought to have known,

(i) that the injury for which he seeks a remedial order had occurred,

(ii) that the injury was to some degree attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding,

or

(b) 15 years after the claim arose,

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2) The limitation period provided by clause (1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in clause (1)(a);

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in clause (1)(a) to the principal first actually acquired that knowledge;

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge more than 2 years before his death,

(ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge after his appointment.

(3) For the purposes of clause (1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions arises when the conduct terminated or the last act or omission occurred;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurred;

(c) a claim based on a demand obligation arises when a default in performance occurred after a demand for performance was made;

(d) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution arises when the claimant for contribution was made a defendant in respect of, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based, whichever first occurs.

(4) The limitation period provided by clause 3(1)(a) does not apply where a claimant seeks a remedial order for

possession of real property, including a remedial order under section 60 of the *Law of Property Act*.

(5) Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by clause (1)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by clause (1)(b).

Comment

Subsection 3(1) - Basic Limitation Provisions

1. Ss. 3(1) contains the general limitations provision. It defines the two limitations periods - the discovery period and the ultimate period - and requires the defendant to activate the defence by pleading it.

Clause 3(1)(a) - Discovery Rule

2. Cl. 3(1)(a) answers five central issues involved in the formulation of a discovery rule: (i) the relationship between the accrual of a claim and a discovery rule; (ii) the amount of knowledge which should be required; (iii) the length of the discovery limitation period; (iv) the constructive knowledge test; and (v) the claims that should be subject to the discovery rule.

3. *Relationship between the accrual of a claim and the discovery rule.* The Act states clearly and directly that the discovery period begins when the claimant acquires the requisite knowledge. It does not provide for the postponement or extension of a limitation period otherwise beginning with the accrual of a claim, as legislation in some jurisdictions has done.

4. *Amount of knowledge required.* The discovery period begins with the discovery by the claimant of three matters:

(1) that the injury for which he seeks a remedial order had occurred (subcl. 3(1)(a)(i)),

(2) that the injury was to some degree attributable to conduct of the defendant (subcl. 3(1)(a)(ii)), and

(3) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding (subcl. 3(1)(a)(iii)).

5. *Example of the impact of subcl. 3(1)(a)(i).* The example is based on a 2-year discovery period. The claimant, Myra's, car was struck at the rear by a car driven by the first defendant, Oliver. Myra immediately discovered that the tail light on her car was broken. She also felt the jolt of the impact and a slight twinge to her spine. Over the following 2 years she felt pains in her back, but attributed them to sore muscles caused by routine exercising. Three years after the accident Myra discovered that she had a serious spinal injury caused by the accident, and she could not reasonably have discovered this fact sooner. She promptly brought an

action against Oliver requesting a remedial order for damages for the spinal injury and for the broken tail light. It is quite possible that a court would conclude that Myra's request included two separate claims: one (claim 1) based on the serious spinal injury, and the other (claim 2) based on the damage to the tail light. As Myra sought a remedial order in respect of claim 1 immediately after she discovered that she had a serious spinal injury, this proceeding was brought within the 2-year discovery period. However, the 2-year discovery period would have run against claim 2.

6. *Comment on and example of impact of subcl. 3(1)(a)(ii).* Just as the discovery period may begin at different times for different injuries for which remedial orders are claimed, so the discovery period may begin at different times against different defendants. It would not be reasonable for the discovery period to begin before the claimant discovered any causal link between his harm and the defendant's conduct. Continuing the previous example, assume that Myra learned, shortly after she brought her action against Oliver, that the accident had been caused, at least in part, by a failure of new brakes negligently installed in Oliver's car by Mark. The discovery period applicable to a claim against Mark would not begin until Myra knew that his injury was to some degree attributable to conduct of Mark.

7. *Comment on subcl. 3(1)(a)(iii).* Potential claimants rarely seek the advice of lawyers until they perceive that they have suffered relatively serious harm. Even if a potential claimant does seek the advice of a lawyer, the lawyer will rarely recommend the expense of bringing a proceeding unless he is reasonably certain that the harm suffered by the claimant will justify it. A limitation provision that failed to recognize these realities and which encouraged proceedings to be brought prematurely would serve neither claimants nor the legal system.

8. When was harm sufficiently serious to have warranted bringing a proceeding? The circumstances may vary enormously from one specific situation to another. The Act does not attempt to list considerations common to many cases because a statutory list would be of dubious benefit to experienced judges, to whom the considerations will be patently obvious, and might unnecessarily constrain their judgment. Experienced trial judges are well equipped to answer such a judgmental question. Clause (iii) of s. 3(1)(a) invites the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the analysis of the advantages and disadvantages of bringing a legal proceeding which would be reasonable for the actual claimant.

9. *Length of the discovery limitation period.* The discovery period is 2 years. Two years gives the claimant a reasonable period of time from discovery to bring a specific claim. The period will not begin to run until the claimant knew or should have known the three basic facts which trigger its operation, and he will be given 2 more years to consult a lawyer, to investigate the law and facts, to conduct settlement negotiations with the defendant, and to bring a proceeding if necessary.

10. *Constructive knowledge test.* The constructive knowledge test charges the claimant with knowledge of facts which in his circumstances he ought to have known. This is the standard of the reasonable man.

11. *Claims subject to the discovery rule.* The discovery rule is applicable to all claims governed by the Act. The principal reason for the broad application of the rule is based on justice. Most of the hardship cases which have arisen in the past have concerned undiscovered claims based on personal injury or property damage caused by negligent conduct. But there have also been undiscovered claims

based on personal injury, property damage and other economic loss caused by intentional conduct, whether tortious or in breach of contract. If the primary concern is the claim which the claimant could not reasonably have discovered, a statute ought not to discriminate simply because there will be more claims in one possible category than another.

12. Another important reason for applying the discovery rule across the board is to make the Act as simple and comprehensible as reasonably possible. Restricting the application of the discovery rule to only some claims would present categorization problems in drafting the legislation, and characterization problems for lawyers and the courts in applying it. In addition, the claims which are not subject to a discovery rule would have to be governed by fixed limitation periods beginning with the accrual of the particular claim. As to these claims, the accrual rule problems would remain. One fixed limitation period beginning with the accrual of any claim cannot adjust to the different discovery periods which might be considered reasonable for different categories of claims. Therefore, different categories of claims would have to be defined and matched to different fixed limitation periods. This would present further categorization problems in drafting the legislation and characterization problems for lawyers and courts in applying it. Under the Act, the incidence of these problems, which have been primarily responsible for making limitations law so incredibly complex, will be significantly reduced.

Clause 3(1)(b) - Ultimate Rule

13. Subcl. 3(1)(b) answers two central issues involved in the formulation of an ultimate limitation rule: (i) the time of commencement of the ultimate limitation period, and (ii) the length of the ultimate limitation period.

14. *Commencement of the ultimate limitation period.* For most claims, the ultimate period begins with the accrual of the claim. Most claims will accrue at the time of the defendant's conduct, that is, when the defendant did, or failed to do, something. (This is not always the case. Ss. 3(3) therefore specifies commencement times designed to resolve the accrual rule problems with respect to specific types of claim where they have been most troublesome, either because beginning the ultimate limitation period at the accrual of a claim produces an unsatisfactory result or because of problems produced by the uncertainty of the accrual rules.)

15. *Length of the ultimate limitation period.* The length of the ultimate limitation period is 15 years. Within 15 years after the occurrence of the events on which the overwhelming majority of claims are based, the claims will have been either abandoned, settled, litigated or become subject to a limitations defence under the discovery rule. The class of remaining potential claimants will have become very small. However, without an ultimate period, the entire society of potential defendants would remain subject to a tiny group of claims.

16. An ultimate period of 15 years is justified by reasons based on the peace and repose of the collective society and its individual members. It wipes the slate clean as to any alleged breach of duty insofar as human transgressions are concerned.

17. An ultimate period of 15 years is also justified by reasons based on economics. By this time the cost burden imposed on potential defendants, and through them on the entire society, of maintaining records and insurance to secure protection from a few possible claims will have become higher than can reasonably be justified relative to the benefits which might be conferred on a narrow class of possible claimants.

18. An ultimate period of 15 years is further justified by evidentiary reasons. Any ultimate period will result in the denial of a remedy to some claimants with meritorious claims which could not with reasonable attention have been discovered before the expiration of this period. Obviously, more claims will be rendered sterile by a period of 15 years than by one of 30 years (the period chosen in the *B.C. Act*, s. 8), although the difference will be exceedingly slight. By the time that 15 years have passed after the occurrence of the events on which a claim is based, the evidence of the true facts is likely to have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision. At this point adjudication will as likely result in a judicial remedy for a claimant with a spurious claim as one with a meritorious claim. Adjudication under these circumstances can only detract from the credibility of the judicial system, and undermine its effectiveness. As Laycraft, J.A. observe in the case of *Costigan* v. *Ruzicka*, (1984) 13 D.L.R. (4th) 386 (Alta. C.A.):

> Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions.

Raising Defence

19. To acquire the immunity from liability provided by the limitations defence from any liability under the claim, the defendant must plead it. The defence is not self-activating. This requirement is consistent with Rule 109 of the Alberta Rules of Court which specifically requires a defendant to raise any statute of limitations defence.

20. The defence produces consequences that are procedural and consequences that are substantive.

21. *Procedural consequences.* The direct consequences of raising the defence are procedural. As is stated directly at the end of ss. 3(1): if a claim subject to the Act is not brought within the applicable limitation period, "the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim." The Act does not preclude a claimant from bringing a proceeding after the expiration of an applicable limitation period. Rather, a claimant is free to bring a proceeding when he chooses, and the defendant is given a defence to a tardy claim which he can assert or not, at his option.

22. The limitations defence does not challenge the claim on its merits. No policy issue is involved here, for limitations statutes have, over the centuries, been uniformly interpreted as intended to create a defence for a defendant who successfully asserts such a statute.

23. In this way, the Act avoids the problem raised by limitations statutes in common law jurisdictions that have typically contained a provision drafted similarly to ss. 4(1) of the *Limitations Act*, R.S.A. 1980, c. L-15, which prescribes that "The following actions shall be commenced within and not after the time respectively hereinafter mentioned . . . " Literally, this provision expresses a public policy that a proceeding *must* be commenced within the stated limitation period, with the consequence that the court should dismiss a tardy action even if the defendant does not raise a limitations defence.

24. *Substantive consequences.* The procedural consequences may have substantive effect. When a defendant obtains an immunity from liability under the remedy the claimant requests, the issue of whether the claimant even had the alleged right will not have been determined, and if there is another remedy available, the claimant will remain

free to assert it. Usually, however, the claimant will request that the court grant him one or more remedies selected from a group comprised of all of the possible remedies available under the law. If the defendant obtains a limitations defence to such a claim, procedurally, the claimant will no longer be able to enforce the alleged right at all relative to the particular alleged violation. However, if the claimant actually had the alleged right, it will remain intact. Frequently the right will be a one-time right, such as a right that the defendant perform a contract. If the defendant breached the contract, but obtains a limitations defence against any remedies available to the claimant under law to enforce the contract, the claimant will be left with a sterile right.

25. Although a limitations statute can prescribe substantive as well as procedural consequences by providing for the extinguishment of an unenforceable right, the Act does not contain any general provision extinguishing rights. That is because the objective of a limitations system is to force the timely litigation of suits if there is to be litigation. The objective is not the extinguishment of rights.

Subsection 3(2) - Commencement of Discovery Period - Special Circumstances

26. Ss. 3(2) prescribes whose knowledge will trigger the operation of the discovery period in three special circumstances:

(1) when the claimant is a successor owner of a claim,

(2) when the claimant deals through an agent, and

(3) when the claimant is a successor owner of a claim as a personal representative of a deceased person.

27. *Successor owner.* Where there is a successor owner of a claim who is not a personal representative of a deceased person the discovery period begins when *either* a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the requisite knowledge. This is the most common of the three special situations.

28. The rule applies when the successor owner has acquired the claim in *either* a commercial or a donative transaction, and it draws no distinction between a successor owner who holds beneficially and one who holds in trust.

29. The discovery period begins if a predecessor owner first acquires the requisite knowledge. In a donative transaction the predecessor should be responsible for conveying any knowledge he has to his successor. In a commercial transaction the successor should ensure that he has obtained any knowledge possessed by his predecessor or obtained appropriate guarantees.

30. The discovery period also begins if the successor owner first acquires the requisite knowledge. The operation of this basic rule is not conditioned on either the predecessor or the successor owner having acquired the requisite knowledge while the owner of the claim.

31. *Principal/agent.* Where the claimant (the principal) has an agent, the discovery period begins when the agent first actually (but not constructively) acquired the requisite knowledge, if he had a duty to communicate that knowledge to his principal. This rule is based on the principle that if an owner of a claim chooses to deal through an agent, and if the agent has a duty to communicate certain knowledge to his principal, then the principal should be bound by the knowledge of his agent.

32. *Personal representative.* Where the claimant is a successor owner of a claim

as the personal representative of a deceased predecessor owner, the limitation period begins against the personal representative at the earliest of three possible times (*see* comments #8, #9 and #10). The policy objective here is to give either the deceased owner of a claim or his personal representative a full discovery period.

33. Subcl. 3(2)(c)(i) deals with the earliest point in time. It will occur when the deceased owner of a claim acquired or ought to have acquired the requisite knowledge more than 2 years before his death, but failed to bring a proceeding. In this case the full discovery period would have run, and the defendant would have become entitled to immunity from liability under the claim, before the deceased died. Because limitations law does not bar claims, the claim would pass to the personal representative. However, in this case the discovery period should begin against the representative when it began against the deceased. The representative could bring a proceeding seeking a remedial order in respect of the claim, and the defendant could assert his immunity, as they respectively choose.

34. Subcl. 3(2)(c)(ii) deals with the intermediate point in time. It will occur when the personal representative actually had the requisite knowledge at the time of his appointment. Assume this example. The deceased acquired the requisite knowledge and promptly discussed it fully with her daughter, who later became her personal representative. During the next 20 months the deceased visited a lawyer and he began an investigation of the facts and law. At the end of this 20 months the deceased was killed in an accident. One month later the daughter was appointed the personal representative of her mother's estate. If the discovery period began against the representative when either she or the deceased first acquired the requisite knowledge, the representative would have only three months left to bring a proceeding. Indeed, if it had taken four months for the daughter to obtain the appointment, the discovery period would have expired before she even became the representative. Legally, one who may become a personal representative has no duty to do anything in that capacity until the appointment. Therefore, the personal representative should have a full discovery period beginning with the appointment even if he had the requisite knowledge before the appointment. However, the discovery period should begin against a personal representative at the time of appointment only if he actually had the requisite knowledge then; it would be quite inappropriate to attribute constructive knowledge, knowledge which one would have discovered through reasonable investigation, to one who has neither the duty nor the authority to make any investigation.

35. Subclause 3(2)(c)(iii) deals with the last of the three possible times when the discovery period could begin against a personal representative. It will occur when he acquired or ought to have acquired the requisite knowledge after his appointment. In this case the discovery period either never began to run against the deceased, or did not run for 2 full years before the date of death. Assume that the discovery period began to run against the deceased one year before his death, and that the personal representative was a trust company named as Executor in the last Will. If the death were accidental, the deceased would almost certainly not have discussed the claim with the named Executor. Even a person who anticipated death from illness would seldom have the combination of strength and inclination required to perform such a business chore. If the discovery period began against the personal representative when it began against the deceased in this case, it would reflect a conclusion that the estate of a deceased, and hence his beneficiaries, should suffer the possible loss of a claim because the deceased failed to

communicate knowledge to a named Executor when few persons could reasonably have been expected to do so, and when the named Executor had neither the right nor the duty to take any action based on the knowledge.

36. The situation where there is an involuntary transfer of a claim when an order for a person under disability is made under the Dependent Adults Act is analogous to the situation where there is an involuntary transfer of a claim to a personal representative because of the death of the owner. The former situation is discussed in conjunction with s. 6.

Subsection 3(3) - Commencement of Ultimate Period - Special Circumstances

37. Ss. 3(3) specifies when the ultimate period begins for five types of claims for which the accrual rules have been particularly troublesome in the context of limitations law. The provisions in ss. 3(3) do not affect the general law with respect to accrual, for when a claim should accrue under the general law will frequently depend on a different set of policy considerations than those which dictate when a limitation period should commence. (Most claims will accrue, as a matter of law, at the time of the defendant's conduct: when he did, or failed to do, something. However, some claims will accrue at a different time, and when this happens the accrual rule does not serve the objectives of limitations law. In addition, sometimes the general law does not clearly establish when a claim does accrue.)

Clause 3(3)(a) - Course of conduct

38. *The ultimate period commencement rule.* Cl. 3(3)(a) provides that the ultimate period for a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, begins when the conduct terminated or the last act or omission occurred.

39. *The ordinary accrual rule.* Normally the ultimate period begins when a claim accrues. However, the lack of a generally applicable definition of a claim creates problems in limitations law which are particularly acute when the legally wrongful conduct consists of a continuing course of conduct or a series of acts or omissions so closely related as to constitute a course of conduct.

40. The problems come in two basic variants, which can be discussed in two examples.

41. *Example #1.* The defendant, Smith's, factory emitted fumes which continuously drifted over the claimant, MacIntyre's, farm and which, in the course of time, harmed both him and his fruit trees.

In this example, there could be three breaches of duty, based respectively on trespass, negligence and a statute; there could be three distinct claims; and they could accrue at different times. Or, focusing on MacIntyre's harm rather than the basis of legal liability, there could be two claims, one for personal injury and one for property damage. Or, focusing on Smith's conduct, there could be one claim based on his continuous wrongful conduct.

42. *Example #2.* The defendant, Kennedy, exposed the claimant, Edwards, an employee, to nuclear radiation periodically (daily, weekly,or monthly) which, in the course of time, harmed him.

This example lends itself to similar but more difficult analysis because of the periodic acts. Each exposure of Edwards to radiation could be considered a separate breach of a particular duty producing multiple claims. Moreover, because of changing government safety

regulations in the nuclear industry, Kennedy's wrongful conduct might have consisted of different acts or omissions at different times, which violated different regulations and hence different duties, and which produced multiple claims.

43. *Discussion.* Insofar as the objectives of limitations law are concerned, it doesn't matter how many breaches of duty there were, how many different duties were breached, how many claims there are, or when they accrued, if the claims all resulted from a continuing course of conduct or a series of related acts or omissions. The policy issue is when should the ultimate period begin: when the legally wrongful conduct began or when it ended. Assume that, in both *Example #1* and *Example #2*, the defendant's conduct stopped exactly 15 years from the date that it started. If the ultimate period were to begin when the conduct started, the defendant would be entitled to assert his immunity from liability under the claimant's claims a moment after the defendant's conduct stopped. The reasons for a limitations system based on evidence and repose do not require this harsh result. Stale evidence should not present a significant problem, for the evidence will have continually renewed itself with the defendant's repetitive conduct. Justice does not require giving the defendant repose for wrongful conduct which just stopped. Hence cl. 3(3)(b) provides that the ultimate period begins when the conduct has ended.

Clause 3(3)(b) - Breach of a duty

44. *The ultimate period commencement rule.* Cl. 3(3)(b) provides that the ultimate period for a claim based on the breach of a duty begins when the conduct, act or omission occurred. The rule applies to any claim which includes damage as a constituent element. It is immaterial whether the duty was based on tort, contract, statutory duty or otherwise.

45. *The ordinary accrual rule.* Under the general law a claim based on the breach of a duty does not accrue until there is damage, and it may accrue at a later time. In the case of the *City of Kamloops* v. *Nielsen*, (1984) 10 D.L.R. (4th) 641, the Supreme Court of Canada appears to have held that such a claim does not arise until the claimant first discovered the damage, or could with reasonable diligence have discovered it. As the law evolves the claim may not arise until the claimant discovered, or ought to have discovered, even more information about the claim.

46. *Discussion.* The 2-year discovery period does not begin until the claimant discovered, or should have discovered, the damage and further relevant information. However, to achieve its objective of securing repose for the society of potential defendants, the ultimate period must begin at the time of a defendant's negligent conduct, even though that conduct will not be legally wrongful unless it produces damage at some time, perhaps many years later.

47. The ultimate period for a claim based on the breach of a duty may expire before the claim has even accrued, for the damage may not have occurred by that time, and even if it has, the claim may not have accrued under the discovery rule. This problem of legal principle is inescapable because there is no feasible alternative consistent with limitations policy.

Clause 3(3)(c) - Demand obligation

48. *The ultimate period commencement rule.* Cl. 3(3)(c) provides that the ultimate period for a claim based on a demand obligation begins when a default in performance occurred after a demand for performance was made.

49. *The ordinary accrual rule.* A demand obligation will usually be a promise to pay a debt on demand. For

technical historical reasons a claim based on a demand debt accrues when the debt arose rather than when a demand for payment was made.

50. *Discussion*. If the ultimate period began at the accrual of this claim, and if the creditor, Woodstock, demanded payment of the debt more than 15 years from the date the debt arose, the debtor, Brown, would already be entitled to assert his immunity from liability under Woodstock's claim. Insofar as limitations law is concerned, it does not make sense to consider Woodstock as having breached a duty to pay a demand debt before a demand for payment was ever made. The practical result is that the ultimate period will probably never run against a demand obligation, for when Woodstock demands payment, if Brown fails to pay, Woodstock will know that he is being harmed and the 2-year discovery period will begin to run.

Clause 3(3)(d) - Fatal Accidents Act

51. *The ultimate limitation commencement rule*. Cl. 3(3)(d) provides that the ultimate period for a claim under the *Fatal Accidents Act*, R.S.A. 1980, c. F-5, begins upon the occurrence of the conduct which caused the death upon which the claim is based.

52. *The existing law*. Under ss. 3(1) of the *Fatal Accidents Act*, the court may award damages to claimants appropriate to the injuries they suffered resulting from the death. Consistent with this, s. 54 of the *Limitations Act*, R.S.A. 1980, c. L-15, imposes a 2-year limitation period beginning with the death of the person upon whose death the claim is based. The problem is that, just as careless conduct may have occurred many years before it results in damage, and the possible accrual of a claim, so the conduct which eventually causes a death may have occurred more than a decade before the resulting death. The policy issue is therefore similar to the one discussed in comments #44 to #47 in connection with a claim based on the breach of a duty.

53. *Discussion*. If the ultimate period is to give meaningful protection to defendants, it must begin at the time of a defendant's conduct. Under s. 54 of the *Limitations Act*, any defendant whose conduct contributed to the injury of a person is vulnerable to a claim, for 2 years after the death of the person and possibly many years after the conduct in question, alleging that the injury, and hence the defendant's conduct, contributed to the death.

54. When there is a causal link between a defendant's conduct and the death of a person, the death will, in the overwhelming majority of cases, occur within 15 years of the defendant's conduct. However, because of s. 54, a large group of possible defendants will be exposed to undue risk unless they maintain protective records and insurance coverage for very prolonged periods. This result is not consistent with limitations policy.

Clause 3(3)(e) - Contributions

55. *The ultimate period commencement rule*. Cl. 3(3)(e) provides that the ultimate period for a claim for contribution begins when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based.

56. *The existing law*. The reasons for and the operation of this proposal can be best discussed in terms of an example. Al was injured in an automobile accident, and the tortious conduct of three persons, Peter, Lyndon and Richard, contributed equally to cause the injury. Al could obtain a judgment for his full damages against any one or all of these tort-feasors. However, under the common law rule, if any one of them, say Peter, satisfied the judgment, he could not

require either of the others to reimburse him for, or contribute, their fair one-third share of the damages. The *Alberta Tort-Feasors Act*, R.S.A. 1980, c. T-6, gives any tort-feasor who has been held liable for the damages a right to recover contribution from any other tort-feasor who has been or could be held liable for the same damages. However, the *Tort-Feasors Act* does not expressly state when a claim for contribution accrues.

57. *Discussion.* When the ultimate period for a claim for contribution should begin raises a complex and difficult issue. Any one of three different times could have been selected:

(1) when the injured claimant's claim accrued against a given tort-feasor;

(2) when liability upon which a claim for contribution is based is imposed on a claimant for contribution; or

(3) when the claimant for contribution was made a defendant under a claim seeking to impose a liability upon which the claim for contribution could be based.

58. *When the injured claimant's claim accrued against a given tort-feasor.* This is the earliest possible commencement time for the ultimate period. In the preceding example, assume the following facts. The accident occurred on January 1, 1965; Al's claims against Peter, Lyndon and Richard accrued at that time; Al discovered the requisite facts required by the discovery rule as to Peter roughly 14 years later, and Al could not reasonably have discovered them sooner; Al brought a claim against Peter in late December 1979; Peter was completely surprised by the claim; Peter hired a lawyer and factual investigations were begun; in July 1980 Peter discovered that Lyndon's conduct contributed to Al's injury; and at that time Lyndon remained unaware that either Al or Peter had any claim against him. Peter would like to join Lyndon to the proceeding previously commenced by Al, and to bring a claim for contribution against Lyndon. But to what avail? If the ultimate period against Peter's contribution claim against Lyndon began when Al's claim against Peter accrued, 15 and 1/2 years would have passed and Lyndon would be entitled to assert his immunity from liability under Peter's claim.

59. This option would be unduly harsh on a claimant for contribution if the original tort claim were brought near the end of the ultimate period applicable to that claim.

60. Section 5 on claims added to a proceeding previously commenced contains a provision under which Lyndon would lose his limitations defence against Peter's claim if Lyndon obtained certain specified knowledge of Peter's claim during the limitation period applicable to that claim. As the assumed facts state that Lyndon was unaware that either Al or Peter had a claim against him, Lyndon would not lose his limitations defence.

61. *When liability upon which a claim for contribution is based is imposed on a claimant for contribution.* This is the latest possible commencement time for the ultimate period. Continuing the preceding example, assume that Al's claim against Peter, which was brought in December 1979, went to trial in July 1982; that a judgment imposing liability upon Peter was granted; and that Peter's liability became final under an appellate decision given in July 1983. The ultimate period on Peter's claim for contribution against Lyndon would begin in July 1983, when liability to Al was finally imposed on Peter. A strong argument can be made, based on sound legal theory, that a claim for contribution cannot accrue until the liability upon which it is based has been imposed, and that the limitation period applicable to the claim should begin then. How could Lyndon have a duty to contribute to the satisfaction of Peter's

liability before any liability has been imposed on Peter in favor of Al? Clause 3(1)(c) of the *Tort-Feasors Act* supports this argument, for it says

> (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage ...

In short, Peter has a right to contribution only if he *is* liable to Al, but if that condition is met, Lyndon will have a duty to contribute merely because he *would be* liable to Al if sued. Nevertheless, under this option the ultimate period applicable to Peter's claim for contribution against Lyndon would not even begin until July 1983, 3 and 1/2 years after Al brought the original claim against Peter in December 1979.

62. This option would unnecessarily extend the operation of the ultimate period.

63. *When the claimant for contribution was made a defendant under a claim seeking to impose a liability upon which the claim for contribution could be based.* Relative to options (1) and (2), this is an intermediate commencement time for the ultimate period, and it is the option selected in the Act. Under this option the ultimate period on Peter's claim for contribution against Lyndon would begin in December 1979, when Al brought his claim against Peter. The theoretical defect inherent in this solution was discussed in the preceding paragraph; the limitation period applicable to Peter's claim for contribution from Lyndon will begin before Peter's claim accrued, for unless and until Peter is liable to Al, Peter will have no right to contribution from Lyndon. However, paragraph (a) as to negligence claims tolerates the same theoretical impurity, for the ultimate period applicable to a negligence claim can begin before the damage has occurred and hence before that claim accrued. Nevertheless, as a practical matter, once Peter becomes a defendant under any claim he will begin to investigate the facts, and if it is a tort claim he will have a strong incentive to learn whether or not there are any other tort-feasors who would in the future have a duty to contribute and hence to reduce his ultimate economic loss. In short, option (3) gives a claimant for contribution ample time to take steps to find other persons to share the potential liability.

64. This option is the fairest and most practical compromise.

65. There are frequently a string of defendants in a tort situation. In the example under consideration, assume that Peter was the negligent driver whose car struck Al's car; that Lyndon was a repair garage which was negligent in repairing the brakes on Peter's car before the accident; that Richard was the manufacturer of defective parts which Lyndon installed in Peter's car in connection with the repair job; and that Peter brought a claim for contribution against Lyndon in December 1980. It is Lyndon, rather than Al or Peter, who is most likely to discover that Richard's conduct contributed to Al's injury. Under the third option the ultimate period applicable to Lyndon's claim for contribution against Richard would begin when Lyndon was made a defendant under Peter's claim for contribution in December 1980, and would not expire until 15 years later. As a matter of practical reality this problem is more a matter of sound than fury. When any tort-feasor is made a defendant in a civil proceeding which originated with a tort claim, it is in his interest to make all reasonable efforts to discover all other tort-feasors liable for the damages, to join them to the proceeding, and to bring claims for contribution as soon as possible. Consequently, if a claimant for contribution does not bring a timely claim for contribution, it is most probable that

the 2-year discovery period will strike the claim long before the expiration of the ultimate period.

66. Cl. 3(3)(e) also covers the situation when a claimant for contribution incurred a liability through the settlement of a claim. Of course there is no right of contribution unless it is created by the *Tort-Feasors Act*, and no right is presently created in this situation. Nevertheless, most modern statutes on this subject do create a right of contribution based on a settlement, and it is reasonable to assume that Alberta will adopt this change at some time. When it does, an applicable limitation provision will be available, and in the meantime the provision will do no harm.

Subsection 3(4) - Exception from Discovery Rule of Claim for Remedial Order for Possession of Property

67. The effect of ss. 3(4) is to make adverse possession subject to the ultimate rule, but not the discovery rule. The result is that the true owner must reclaim her property within 15 years from the time at which the adverse possession began. In other words, a flat 15-year limitation period, measured from the date of accrual of the claim, would apply.

Subsection 3(5) - Burden of Proof that Claim Brought Within Limitation Period

68. Ss. 3(5) specifies two burdens of proof where the defendant pleads a limitations defence - one for the discovery period and the other for the ultimate period.

Clause 3(5)(a) - Burden of proof under the discovery rule

69. Cl. 3(5)(a) departs from the requirement under the existing law. Under cl. 3(5)(a), the claimant carries the burden of proving that his claim was brought within the discovery period. There are three reasons for placing the burden of proof under the discovery rule on the claimant. First, when a claimant first knew something is based on his state of mind, and is a subjective matter peculiarly within his own knowledge. Second, the objective written or oral evidence of what a claimant was told will usually be more available to him than to the defendant. Third, the objective evidence about when a claimant ought to have discovered the requisite knowledge will also probably be more readily available to the claimant.

70. This provision is consistent with the law under other modern limitations statutes (*see e.g.*, the 1982 Uniform Act, ss. 13(4) and the B.C. Act, s. 6(5)) although with some the issue is not free from doubt (*see Report for Discussion No. 4* at p. 137).

Clause 3(5)(b) - Burden of proof under the ultimate rule

71. Cl. 3(5)(b) places the burden of proving that a claim was not brought within the ultimate period on the defendant. This burden is consistent with the rule of judicial origin under the existing law under which the defendant is required to prove that a claim *was not* brought within a limitation period. Limitation periods under the existing law, like the ultimate period under the Act, begin with the accrual of the claim.

72. A claim will normally accrue when the defendant's conduct breached a duty owed to the claimant, and if the time of occurrence of the defendant's conduct is in issue the defendant will, on balance, be in as good a position as the claimant to prove the relevant facts. Moreover, there is some legal logic in the principle that a defendant should carry the burden of proof as to a defence.

73. The burden is expressly stated in the Act to avoid any ambiguity arising from the provision in cl. 3(5)(a) with respect to the discovery period.

[Section 4 - Acquiescence or Laches]

4 Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

Comment

Judicial Discretion Regarding Equitable Claims

1. S. 4 makes an exception from the general policy that the courts should not be authorized to either shorten or extend a limitation period specified in the Act. (No such discretion is included in the Act with respect to either the discovery period or the ultimate period.)

2. The exception applies to proceedings in respect of claims based in equity requesting equitable remedies. It authorizes a court to deny a claimant an equitable remedy under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to a defence under either the discovery or ultimate periods.

3. The exception does not permit the court to extend a limitation period.

Breach of Trust Cases

4. The Act does not continue the exception, expressly stated in s. 41(2) of the present Alberta Act, of certain claims against trustees. That is because the new Act balances the limitations principles embodied in the strategies at law and in equity.

5. The exception, in s. 41(2) of the present Act, of a claim founded on a fraud or fraudulent breach of trust to which the trustee was party or privy is protected by s. 5 which suspends the ultimate period during any period of fraudulent concealment by the defendant.

6. The exception, in s. 41(2) of the present Act, of a claim for the recovery of property or proceeds still retained by the trustee, or a claim based on the conversion of property or proceeds by the trustee is protected, in part, by s. 3(3)(a) which, for purposes of the measurement of the long-stop period, extends the time of commencement of a claim or claims based on continuous or repeated breaches of duty.

7. Three examples will illustrate the operation of the Act on claims based on breach of trust.

8. Example #1: The beneficiary is induced to wait more than 15 years by the promises of the defendant to make good the fraud or retention of trust property.

In this example, the promises supplying the inducement would push back the ultimate period by triggering the operation operation of s. 3(3)(a).

9. Example #2: The trustee, in breach of the terms of the trust, wrongfully retains trust property, and

(a) the beneficiary has or ought to have knowledge of the breach but simply waits more than 2 years to litigate, or

(b) the beneficiary does not find out about the breach until after the expiration of 15 years from the date the wrongful retention commenced.

In neither case is the defendant entitled to a laches defence in equity.

Example #2(a) illustrates a case where the discovery limitation period would apply. The beneficiary would not be permitted to sit on his or her rights for more than 2 years.

In Example #2(b), the result would depend on the precise terms of the trust. Arguments based, for example, on fraudulent concealment or on continuous breach, might be open to the claimant. However, if such arguments fail then the the defendant, upon pleading the applicable limitations defence under s. 3(1), would be entitled to protection in the form of an immunity. The defendant trustee would be provided with an immunity for the same reasons defendants in other circumstances are provided with an immunity from claims falling outside the 15-year ultimate limitation period - reasons based on repose, stale evidence, deficits in the adjudicative process with the passage of time, and the like. Absent the success of arguments based on one or other of the special provisions, this example illustrates precisely the situation where repose is important.

10. Example #3: A brother is left monies by his mother in trust through a joint bank account with him for the benefit of himself and his brothers and sisters equally. The brother spends all the monies within days after his mother died. No one learns of the trust duty until more than 15 years later.

Example #3 provides another illustration of the merits of the principle of repose, and the defendant would be entitled to immunity under the 15-year ultimate period, when pleaded.

[Section 5 - Concealment]

5(1) The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant fraudulently concealed the fact that the injury for which a remedial order is sought had occurred.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.

Comment

1. Ss. 5(1) suspends the operation of the ultimate limitation period indefinitely on the grounds that the fraudulent concealment by a defendant of the fact that the injury had occurred should not be rewarded by a limitations defence. (The word "injury" has the broad meaning given in s. 1(e).)

2. The effect of ss. 5(1) is to suspend the operation of the limitation period until the time of discovery. No exception from the operation of the discovery limitation period is required because the discovery period will not begin to operate until the claimant has the requisite knowledge.

3. Because there is no ultimate limitation period, a defendant will always be subject to an allegation of fraudulent concealment and can never be certain that he will be entitled to a limitations defence to a claim. Defendants in some vulnerable categories would therefore be well advised to retain defensive files for an indefinite period of time.

4. Ss. 5(2) imposes the burden of proving fraudulent concealment on the claimant. Placing the burden here is intended to protect defendants against spurious allegations by claimants. The practice of courts of requiring fraud to be established by more than a mere preponderance of the evidence, and often by clear and convincing evidence, will give substantial protection to defendants.

[Section 6 - Persons Under Disability]

6(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

Comment

S. 6(1) - Suspension of Limitation Periods

General

1. Ss. 6(1) suspends the operation of both the discovery limitation period and the ultimate limitation period for a person under disability. "Person under disability" is defined in clause 1(h) to mean (i) a minor, or (ii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim: *see* s. 1, comments #8-11.

2. The operation of the discovery limitation period is suspended for the reason that follows. The discovery period is designed to give a claimant sufficient opportunity after discovery to conduct further investigations, to attempt to negotiate a settlement, and to bring a proceeding seeking a remedial order if necessary. As such, it is based on the assumption that a person who obtains the requisite knowledge has the ability to make reasonable judgments in decisions relating to a claim. This assumption does not fit an adult under disability who is deemed unable to make reasonable judgments in respect of matters relating to his estate, and that applies to decisions relating to a claim.

3. The operation of the ultimate period is suspended notwithstanding that the ultimate period operates against a claimant even if he could not, after reasonable investigation, discover the requisite knowledge about his claim within 15 years and, indeed, whether or not he even ought to have discovered it. That is because the situation of a person under disability is significantly different from that of a person not under disability: while the person not under disability is able to make investigations and reasonable decisions, a person under disability is deemed not to have this capacity, no matter how much knowledge he may have obtained.

4. The suspension under ss. 6(1) applies irrespective of whether the person under disability has a guardian or committee and irrespective of whether the guardian or committee has the capacity to commence a proceeding on behalf of the person under disability.

5. The operation of the limitation provisions is suspended for persons under "prior disability", and for persons under "subsequent disability". The suspension for persons under "prior disability" is in conformity with conventional limitation statutes (*see* e.g. the present Alberta Act, ss. 8, 46 and 59); the suspension for persons under "subsequent disability" represents a departure.

Suspension of Discovery Limitation Period

6. *Prior Disability*. Where the discovery limitation period would otherwise apply, the suspension gives a person who is under disability when his claim arises at least 2 years from the time of his recovery in which to bring a proceeding. If an adult obtains the requisite knowledge while he was under disability, the discovery period will be suspended from the moment when it could have become operative and will remain suspended until the disability ceases. The adult claimant will then have a full 2 years in which to bring a proceeding. A minor will be under disability whenever he obtains the requisite knowledge, the discovery period will be suspended until he reaches age 18, and hence it could not possibly expire before he reaches age 20.

7. *Subsequent Disability*. An example will illustrate the operation of the suspension on the discovery limitation period for a person who comes under subsequent disability. Assume that an adult obtains the knowledge that activates the discovery rule one year before he comes under disability. One year of the discovery period will have run before the disability began. The suspension will give the claimant one year after the disability has ceased in which to bring a proceeding. Without the suspension, the period would expire one year later during the disability.

Subsection 6(2) - Burden of Proof

8. Ss. 6(2) gives the claimant the burden of proving that the operation of the limitation periods was suspended. This is appropriate because it is the claimant who will benefit from the suspension and it is the claimant who will be in possession of the factual information required to prove that he was under disability.

[Section 7 - Claims Added to a Proceeding]

7(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.

(2) When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of clause (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of clause (3)(b) or 4(b), if in issue, was not satisfied.

Comment

1. S. 7 stipulates exceptions to the basic limitations provisions in s. 3 where a claim is added to the proceedings.

2. The exceptions address issues arising from differences of approach in procedural policy and limitations policy toward the addition of claims. Whereas limitations policy seeks to secure eventual peace and repose for defendants, the rules of civil procedure take a liberal approach to the addition of claims through new and amended pleadings because, for reasons of just adjudication and judicial efficiency, it is desirable to have all of the claims which result from related conduct, transactions and events adjudicated in a single civil proceeding.

3. Where an exception is operative, the defendant under a claim added in a proceeding is denied a limitations defence he would otherwise have. The exceptions are therefore restricted to the situations in which they are most needed to accommodate the civil procedure objective of permitting the adjudication of related claims in a single proceeding.

4. The content of the exceptions in s. 7 is based, in substance, on model rules of court proposed by Professor Garry D. Watson in "Amendment of Proceedings After Limitations Periods" (1975) *Can. Bar Rev.* 237. However, s. 7 deviates on some technical drafting points. It also deviates on the broad issue of strategy:

whereas under the Act the exceptions are expressly stipulated, under Professor Watson's solution the court would be given a broadened amendment power which would enable it to override a limitations statute, notwithstanding the expiration of a relevant limitation period, when alternate requirements providing limitations protection are satisfied.

5. The exceptions remove the uncertainty about the current ambit of application of the traditional rule laid down in *Weldon* v. *Neal* (1887) 19 Q.B.D. 394. Under the traditional rules, the courts lacks power to permit an amendment of proceedings or pleadings if the amendment would result in a claim subject to a limitations defence. The rule has been relaxed in more recent cases such as *Cahoon* v. *Franks* [1967] S.C.R. 445.

Subsection 7(1) - Exception for Claims Added to a Proceeding

6. Ss. 7(1) establishes the threshold requirement that, for an exception to apply, the claim must be added in a proceeding previously commenced. The claim may be added either through new pleadings or an amendment to pleadings. It may be added either directly or indirectly, by an amendment which changes the substance of or the parties to a prior claim in such a way as to create a new claim. The procedural situation in which a claim is added (e.g. "counterclaim", "cross claim", "set-off" and "third party proceeding") is not relevant, and dispute on this type of issue is eliminated.

7. Ss. 7(1) does not relieve a court from the task of deciding the legal issue, frequently difficult to determine, of whether a change in the pleadings would produce an added claim if an added claim would be subject to a limitations defence. Instead it gives the court an additional option. The court may, as it does now, decide that a limitations defence is not available to the defendant because a pleading amendment did not produce an added claim. Alternatively, it may decide that, even if an added claim were produced, an exception provision applies and eliminates the limitations defence. The significance of a decision under the Act about whether a claim is a new claim therefore will, in many cases, be substantially reduced from the significance under the traditional approach.

8. Untimely claims, being fatally defective and a nullity, are not included in the exception provisions. Examples of untimely claims include an action purportedly brought (1) by a claimant (through a lawyer) a few days after the claimant died, (2) by a claimant against a defendant a few days after the defendant died, or (3) by a claimant as a personal representative before his appointment. In these cases, there is no valid pleading which is capable of being amended and there is no proceeding to which a claim can be added.

Subsections 7(2), (3) and (4) - Protective Requirements for Defendant

9. The limitations defence is denied only under conditions giving the defendant alternate limitations protection. The protective requirements vary depending on whether the added claim makes any change with respect to a party, and if so, whether the change involves the claimant or defendant (*see* ss. 7(2), (3) and (4)).

Subsection 7(2) - No change of party

10. Ss. 7(2) deprives the defendant of the immunity to which he would otherwise be entitled where there is no change of party. That is to say, both parties to the added claim must already have been parties to the proceeding, and no change can have been made with respect to their description.

Relationship Requirement

11. The only protection for the defendant is the imposition of a "relationship requirement" on the exception: the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

12. The relationship requirement is designed to serve at least three purposes. First, it gives the courts ample latitude to adjudicate claims in a single proceeding whenever this is desireable under objectives of procedural policy. Second, it assists the claimant to exercise some control over the eventual size of the civil proceeding which he commenced. The conduct, transaction or events which the claimant describes in his original pleading will operate as a screen determining which added claims may remain subject to a limitations defence notwithstanding the exception provisions. Third, it prevents any possible prejudice to a defendant because of surprise by the addition of a claim after the expiration of the limitation period applicable to the added claim. Because the defendant (unless the original claimant) must have been made a party to the action under a timely claim, he will know of the conduct, transaction or events described in the original pleading in the action, and he will be able to gather and preserve evidence as to any possible claims against him based on the described conduct, transaction or events.

13. The exception could apply in the following ways. Where the "relationship requirement" is satisfied, the claimant, Connie, could add a further claim against the defendant, Dan, by a pleading amendment. The claim might be defined as an added (or new) claim because it (1) pleaded a new legal theory in support of a claim previously made, (2) requested a different remedy for an injury previously alleged, (3) alleged a distinct new injury, or (4) alleged an increase in the magnitude of the damage resulting from an injury previously alleged. Dan could bring a claim against Connie, by way of counterclaim or set-off, and this claim could be brought in either Dan's first pleadings or by amended pleadings. If either Connie or Dan were to add a second defendant, Rodney, *through a timely claim*, Rodney could add a claim against his claimant by way of counterclaim or set-off. Dan and Rodney could continue to add claims, just as Connie could, as long as the added claim satisfied the relationship requirement.

Subsection 7(3) - Change of Claimant

14. Ss. 7(3) deprives the defendant of the immunity to which he would otherwise be entitled where there is a change of claimant.

15. The change may consist of the addition or substitution of a claimant, or a change in the capacity in which the claimant sues.

Situations Creating Change of Claimant

16. The added claim may result from an amendment to a claim seeking to correct the description of the claimant, or it may seek to add a true stranger to the proceeding as a claimant.

17. *Misdescription of claimant*. Ss. 7(3) permits the addition or substitution of the proper claimant in any misdescription case, and thus avoids the highly conceptual distinction attempted by the courts between the misdescription of a claimant by "misnomer", and the misdescription of a claimant named intentionally but mistakenly, that is a "wrong claimant".

a. *Misnomer*. Here, an intended claimant was misnamed by mistake. For example, the intended claimant, properly described as John C. Doe, Junior, was known, but because of a failure in communication between the claimant and his lawyer, the modifying "Junior" was omitted in the claim, which

thus misnamed the claimant and accurately described his Father. In cases of this type, the courts have held that an amendment of the claim will not add or substitute a new claimant so as to create a new claim, but will merely correct the misnomer of the claimant already before the court. When a court can apply the misnomer doctrine, no claim will be added to the proceeding, and an exception provision is not relevant.

b. *Wrong claimant*. Here, the wrong claimant was named, intentionally but mistakenly. Often the case will have involved a choice between two possible corporate claimants, and the incorrect choice was made: for example, a parent corporation was incorrectly named in lieu of a subsidiary, or a residual corporate shell was named in lieu of a new corporation created in a merger. Technically, an amendment in cases of this type will add or substitute a new claimant and will thus create a new and added claim.

18. *Addition of true stranger as claimant*. There are two types of cases in which a stranger may wish to add himself as a claimant in an action: "true strangers" and "other claimants". Ss. 7(3) permits the addition of a claimant who is necessary if the original claim asserted is to be enforced effectively. It does not deprive a defendant of a limitations defence to the untimely claim of an added claimant who is a "true stranger".

a. *True strangers*. In this type of case a nondiligent claimant will be attempting to slip his untimely claim into an action in which his defendant is already a party. For example, assume that the original claimant, Tom, brought a timely claim against the defendant, Alice, to recover for personal injuries suffered in an automobile accident, and that later a second claimant, Dave, a copassenger in the car driven by Tom, sought to add an untimely claim against Alice to recover for Dave's, personal injuries. Dave's claim would probably satisfy the relationship requirement, and it might satisfy the knowledge to prevent prejudice requirement. However, Dave's claim would be based on a different injury from that suffered by Tom, and Dave's added claim would not be necessary to ensure the effective enforcement of the original claim brought by Tom.

b. *Other claimants*. In this type of case the added claimant will be necessary if the original claim asserted is to be enforced effectively. The claimant is unlikely to be a "true" stranger. A common example is the case in which a married woman or a child requested damages in a personal injury action based on expenses for items which a husband or a parent was responsible for providing. If the married woman or child suffered no damage because of the expenses, only the husband or parent could suffer damage and recover damages.

19. *Effect of discovery rule*. The discovery rule is not of assistance to claims seeking to add claimants, for the commencement of the discovery limitation period will not be delayed until someone, whether client or lawyer, discovers who the proper claimant is or should be.

Protective Requirements

20. For the exception to be operative, the added claim must satisfy three requirements designed to protect the defendant: a "relationship requirement", a "knowledge to avoid prejudice requirement", and an "enforcement of original claims requirement".

Relationship Requirement

21. Clause 7(3)(a) protects the defendant by imposing a "relationship requirement" on the exception from the limitations provisions in s. 3 of a claim adding a claimant. The relationship requirement, discussed in paras. #11-13 above, will provide a defendant with sufficient

protection in most cases within this category. Because the added claim will have made no change with respect to the defendant, he will have been made a party under a prior claim, and within the limitation period applicable to that claim, whether it was the discovery period or the ultimate period. The defendant will be aware of the conduct, transaction or events described in the original claim against him. Although a claim against the defendant may be added after the expiration of the limitation period for that claim, if the only change is with respect to the claimant, the internal substance of the added claim will remain the same as in the prior claim. Even if the added claim contains internal substantive changes as well, it still must be related to the described conduct, transaction or events the defendant will already know about.

Knowledge to Avoid Prejudice Requirement

22. Clause 7(3)(b) protects the defendant by imposing a "knowledge to avoid prejudice requirement. The protection is required because the defendant may be prejudiced by a change with respect to the claimant if he does not learn of his vulnerability to a claim by the "new" claimant until *after* he would have received this knowledge had the added claim been timely. The clause contains two elements designed to safeguard the defendant.

a. First, it provides that the defendant must have received sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits. This element will clearly require the court to exercise judicial discretion, but the objective of the provision is so clearly and simply stated that the courts should not experience problems of interpretation.

b. Second, it specifies that the defendant must have received the sufficient knowledge within the limitation period applicable to the added claim plus the time provided by law for the service of process. For example, assume that the discovery period expired on December 31, 1985 and that the time provided by law for the service of process is one year. Because of the one year allowed by law for the service of process, the original claim need not have been served on the defendant, Georgina, until December 31, 1986. Georgina will therefore not be prejudiced insofar as limitations policy is concerned if the resulting added claim is served within the same time. Now, suppose that Georgina was served with the added claim on April 9, 1986, and hence received full knowledge of the claim before she might have received this knowledge had the added claim been timely and had service on her been delayed. In this example, Georgina received the substnative benefits of the limitations system. However, if Georgina had not been served with the added claim until after December 31, 1986, and if she had not received the required sufficient knowledge of it in some other manner by this date, then the issue of whether or not she was prejudiced in maintaining a defence to it would be relevant.

23. The "knowledge to avoid prejudice" requirement satisfies the evidentiary reasons which demand a limitations system. If a potential defendant has received sufficient knowledge of a potential claim that he will not be prejudiced in maintaining a defence to it on the merits, it is not unreasonable to expect him to recognize that he is vulnerable to the potential claim, that it may be brought after the expiration of the limitation period applicable to it in a proceeding previously commenced, and that he should gather and preserve the evidence necessary for a defence to it on the merits.

Enforcement of Original Claims Requirement

24. Clause 7(3)(c) protects the defendant by imposing an "enforcement of original claims requirement". To meet this requirement, the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

25. Clause 7(3)(c) is designed to exclude the addition of a "true stranger" to the proceeding. It permits the addition or substitution of a claimant, or a change in the capacity in which a claimant sues, because of an amendment required to correct a misdescription of the claimant, the added claim will be necessary or desirable to ensure the effective enforcement of the claims originally asserted in the proceeding. It also permits the addition of a claimant who is not a "true" stranger. Any remaining cases are screened out.

Subsection 7(4) - Change of Defendant

26. Ss. 7(4) deprives the defendant of the immunity to which he would otherwise be entitled where there is a change of defendant.

27. The change may consist of the addition or substitution of a defendant, or a change the capacity in which a defendant is sued,

Situations Creating Change of Defendant

28. As in the case of a change of claimant, the added claim may result from an amendment of a claim correcting the description of the defendant, or it may seek to add a true stranger as a defendant.

29. *Misdescription of defendant.* As in cases in which the claimant was misdescribed, ss. 7(4) permits the addition or substitution of the proper defendant in any misdescription case and thus avoids the highly conceptual distinction attempted by the courts between the misdescription of a defendant by "misnomer" and the misdescription of a defendant named intentionally but mistakenly.

a. *Misnomer.* Here, the defendant under an added claim will have been connected with the action in fact if not in law, will have had knowledge of the action, and will have been misdescribed in the claimant's original claim. In theory a misnomer case is based on a factual finding that the claimant "knew" that the defendant was John C. Doe, Junior, but misnamed him as his Father, John C. Doe. Many of the cases involve situations in which the claimant "knew" the particular governmental entity he wanted to sue, but did not "know" the proper legal name for the entity, and hence misnamed it. In these cases the courts have held that an amendment to pleadings will not add or substitute a new defendant so as to create a new claim. Rather, it will merely correct the misnomer of the defendant before the court. Because the courts have solved the misnomer cases, an exception provision is not necessary for this purpose.

b. *Wrong defendant.* Here, it is assumed that the claimant misdescribed the defendant because he did not "know" who the defendant really was. For example, she thought the defendant was Snowdon, a sole proprietor, when the defendant should have been Snowdon, Ltd., a corporation. Technically, an amendment in these cases adds or substitutes a new defendant, and creates a new claim. Although courts have sometimes applied the misnomer doctrine to these cases, it is difficult to predict when they will do so.

Effect of Discovery Rule

30. To an extent, the discovery rule will assist claimants in bringing timely added

claims, and will, therefore, reduce the need for an exception provision. Note, however, that the discovery rule will be of no assistance for the category of true added claimants, for the commencement of the discovery limitation period will not be delayed until someone, whether client or lawyer, discovers who the proper claimant is or should be.

a. *Misnomer.* The discovery rule is not likely to assist a claimant in a "misnomer" case. The discovery period will not begin until the claimant knew, or ought to have known, that his injury was to some degree attributable to conduct of the defendant, which presupposes knowledge of the identity of the defendant. If the claimant "knew" who the defendant was, but misnamed him, the discovery period could have begun, and if it expired before the claimant amended his claim, only the judicial doctrine that the amendment merely corrected the name of the defendant, and did not add or substitute a new defendant, would salvage the claim. Without the misnomer doctrine an exception provision would be necessary.

b. *Wrong defendant.* The discovery rule will usually salvage a "wrong defendant" case, for the discovery period will not begin before the claimant knew, or should have known, the identity of the defendant. The claimant will already have brought a claim attempting to describe the proper defendant. When he discovers his error, and hence the proper defendant, it can reasonably be assumed that he will make an amendment promptly, and that the resulting added claim will be brought within the discovery period. The exception provision will probably be necessary only when the ultimate limitation period is applicable.

31. *Addition of true stranger as defendant.* An added claim will frequently add a true stranger as a defendant in a proceeding. Assume that the claimant, Elsa, brought a timely claim alleging that the defendant, Penelope's, negligence caused an automobile accident; that Penelope brought a timely counterclaim against Elsa alleging that Elsa's negligence caused the accident; that Elsa and Penelope believe that the negligence of a second defendant, Mike, at least contributed to the accident; and that both Elsa and Penelope wish to add two claims against Mike. Each has a claim for damages based on the injury which he sustained in the accident, and each may have a claim for contribution from Mike should either Elsa or Penelope be held liable to the other.

a. *Claims against a second defendant for damages.* It is possible that the discovery period had expired against Penelope's claim because Penelope acquired the requisite knowledge as to Mike's possible liability through investigations made shortly after the accident, long before Elsa began the proceeding, but that the discovery period had not expired against Elsa's claim. If Mike were negligent, Elsa could obtain a judgment against Mike, but Mike would have a limitations defence against Penelope's claim. It is also possible that Mike received the sufficient knowledge as to Penelope's claim required by the knowledge to avoid prejudice requirement during Penelope's earlier investigation. If so, Mike would lose his limitations defence under the exception provision.

b. *Claim for contribution.* Clause 3(3)(e) provides that, in a claim for contribution, the ultimate limitation period begins when the claimant for contribution (here Elsa or Penelope) was made a defendant under a claim (that of the other) seeking to impose a liability upon which a claim for contribution (a claim against Mike) could be based. The discovery limitation period for a claim cannot begin until the claimant knew, or ought to have known, that the injury for which he claims a remedial order had occurred. Until either Elsa or Penelope is held liable to the other, Mike could have no duty of contribution, and hence neither

Elsa nor Penelope could be injured by a failure of Mike to contribute to satisfy the liability. For example, although D1 could anticipate injury if Mike failed to contribute to satisfy a liability which might be imposed on Penelope, Penelope could not know of his injury until it occurred when liability was imposed on him and Mike failed to contribute to satisfy it. If Penelope knew that Mike's negligence contributed to the accident before liability to Elsa was imposed on Penelope, the discovery period for Penelope's claim for contribution from Mike would probably begin when the liability to Elsa was imposed on Penelope. Otherwise, the discovery period for the claim for contribution could not begin until Penelope discovered, or ought to have discovered, Mike's negligence, and that could be some time after liability to Elsa was imposed on Penelope. In short, the discovery period for a claim for contribution will not begin until a liability is imposed on the claimant and until he also knows that there is a defendant who might be liable to contribute. Once a claimant for contribution knows these facts, he will almost certainly bring a claim within the 2-year discovery period. In practice, therefore, the exception provided in ss. 7(4) will be relevant to a claim for contribution only when the applicable limitation period is the ultimate period.

Protective Requirements

32. For the exception to be operative, the added claim must satisfy two requirements designed to protect the defendant: the "relationship requirement", and the "knowledge to avoid prejudice requirement".

Relationship Requirement

33. Ss. 7(4)(a) protects the defendant by imposing the relationship requirement. The only protective function this requirement performs is to restrict the scope of the exception provision. Unless the added claim satisfies the relationship requirement, the exception provision will not be applicable at all, and the defendant will retain his limitations defence to the added claim. Where the relationship requirement is satisfied, the defendant should not be vulnerable to surprise because the added claim must not introduce matters which are unrelated to the conduct, transaction or events the defendant will have knowledge of.

Knowledge to Avoid Prejudice Requirement

34. Ss. 7(4)(b) also protects the defendant by imposing the "knowledge to avoid prejudice requirement". This requirement must be relied on to give a defendant substantive limitations protection. Under this requirement, a defendant must have received sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and he must have acquired this knowledge within the limitation period applicable to the added claim plus the time provided by law for the service of process, which means that he must have acquired this knowledge no later than he might have acquired it had the addition of the claim been timely and had he been served at the latest time permitted by law.

Two Effects of Subsection 7(4)

35. Two effects of ss. 7(4) are noteworthy: (1) the effect of the discovery rule on an added claim that makes a change with respect to the defendant, and (2) the effect of the exception provision on the ultimate limitation period.

36. *Effect of Discovery Rule*. When an added claim makes a change with respect to the defendant, it will frequently be a timely claim because of the discovery rule, and this will reduce the need to use ss. 7(4).

37. *Effect on Ultimate Limitation Period.* Although the "knowledge to avoid prejudice" requirement satisfies the evidentiary reasons for a limitations system, it does not satisfy either the economic reasons for a limitations system or those based on peace and repose. Insofar as protection for defendants is concerned, the central element in the Act is the ultimate limitation period. Under the exception provision, a defendant may be brought into a proceeding previously commenced under a claim added after the expiration of the limitation period applicable to the claim, and the applicable period can be the ultimate period. Until the termination of the proceeding previously commenced, a potential defendant will be vulnerable to being drawn into it, he will enjoy neither peace nor repose, his economic mobility will be threatened by a potential liability of uncertain magnitude, he will have to continue protective insurance and he will have to retain his defensive evidence. A potential defendant will not be secure until the proceeding previously commenced has been terminated. Because of the knowledge to avoid prejudice requirement, in all probability a potential defendant will have knowledge of the proceeding into which he might be drawn, and he will be able to monitor its progress. But this is not necessarily so.

Subsection 7(5) - Burden of proof

38. Ss. 7(5) deals with the burden of proof in claims added to a proceeding.

Clause 7(5)(a) complies with normal civil litigation theory by giving the claimant the burden of proving that his claim satisfies the "relationship requirement" and the "enforcement of original claims requirement" where one or both of these requirements apply.

39. Clause 7(5)(b) departs from normal civil litigation theory by giving the defendant the burden of proving that he did not receive knowledge during the period allowed where the "knowledge to avoid prejudice requirement" applies. Two reasons justifying the departure from normal civil litigation theory are: (1) that the defendant who has received sufficient knowledge of an added claim is in the best position to prove the facts which establish that he will be prejudiced in maintaining a defence to it on the merits; and (2) that the defendant should carry the burden of proving that he did not receive this knowledge during the period allowed by an exception provision if this requirement is in issue. As under the other exception provisions, the claimant carries the burden of proving that his claim satisfies the "relationship requirement" and the "enforcement of original claims requirement".

[Section 8 - Agreement]

8 Subject to section 10, if an agreement provides for the reduction or extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

Comment

1. S. 8 expressly provides for the alteration of the limitation period applicable to any claim in accordance with an agreement reducing or extending it. By expressly sanctioning agreements made, within the framework of accepted contractual doctrines, by persons respecting limitation provisions applicable to their actual or potential legal controversies, s. 8 resolves any ambiguity about the enforceability of such agreements.

2. *Reduction of Limitation Period.* Potential parties to an action may make an agreement reducing an applicable limitation period for the benefit of the potential defendant. An agreement reducing a limitation period will usually be made before a contemplated transaction, which may result in a breach of duty, has taken place. For example, persons supplying goods or services, such as building contractors or medical doctors, might refuse to enter into a transaction without an agreement providing for a shorter limitation period than provided by statute. Where contracts are unconscionable or otherwise contrary to public policy, the courts can utilize contractual doctrines proscribing the enforcement of contracts in appropriate cases.

3. *Extension of Limitation Period.* Potential parties to an action may also make an agreement extending an applicable limitation period for the benefit of the potential claimant and defendant. An agreement extending a limitation period will usually be made after an alleged breach of duty has occurred. The effect of such an agreement may be to relieve the claimant from the necessity of bringing an action which, in the course of events, may prove to be unnecessary. It will frequently be mutually advantageous to the parties if more time is available for settlement negotiations or if the defendant is granted additional time to perform his obligations, with litigation expenses postponed until they become essential. S. 8 will encourage agreements extending limitation periods for the convenience of the parties.

[Section 9 - Acknowledgment and Part Payment]

9(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income, a share of estate property, and interest on any of the foregoing.

(2) Subject to subsections (3) and (4) and section 10, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.

(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(4) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

Comment

1. S. 9 clarifies and simplifies the common law doctrines of acknowledgment and part payment. Like agreements, acknowledgments and part payments are actions of persons which may alter the normal operation of a limitations system. The basic rules of law governing these doctrines of judicial origin have been legislated in limitations statutes in most common law jurisdictions. The provisions in the Act do not provide a complete codification of the two doctrines. The courts will therefore still have to develop specific rules for unique cases. Where a claim is subject to a limitation period under the Act, the doctrines of acknowledgment and part payment are applicable to the same claims as they are under the *Limitation of Actions Act*.

Restricted Meaning of "Claim

2. Ss. 9(1) restricts the meaning of the word "claim", for the purposes of this section, to a claim for the recovery of an accrued liquidated pecuniary sum (*see also* comments #6 and #13 below).

Acknowledgment

3. Ss. 9(2) continues the policy established at common law under which the acknowledgment by a debtor of a debt resulted in a deemed reaccrual of the claim, a policy subsequently legislated in typical limitations statutes in the form of a renewed limitation period. Where a claim is subject to a limitation period under the Act, the doctrine of acknowledgment is applicable to the same claims as it under the *Limitation of Actions Act*.

4. There are two policy reasons for the common law doctrine of acknowledgment: (1) If a debtor has admitted his indebtedness and his legal duty to pay the debt, he has, by this conduct, renounced his need for the protection afforded by a limitations system. If he has admitted his legal liability, the reasons for limitations protection based on stale evidence, peace and repose, and economic cost are so reduced that a renewed limitation period is justified. (2) The second reason is based on estoppel. If the debtor has promised to pay a debt, the creditor should be permitted to rely on this new promise without bringing an action for a renewed limitation period.

5. To be effective, the acknowledgment must be made before the expiration of the applicable limitation period. This provision in ss. 9(2) provides the defendant with a limitations shield to the claimant's allegation of acknowledgment.

6. An inherent constraint on the scope of the acknowledgment doctrine is embodied in ss. 9(1): it does not apply to a claim for unliquidated damages, whether based on tort or contract, because until a duty to pay a certain or ascertainable sum has been imposed on a person, he will have no legal duty to admit, much less to promise to perform by payment.

7. Ss. 9(3) continues the policy introduced in relatively recent limitations statutes of eliminating the common law requirement that for an acknowledgment to be effective, in addition to the admission of a debt or other readily quantifiable liquidated amount outstanding and unpaid, the admission had to contain an express or implied promise to pay the debt: *see* e.g. *Limitation of Actions Act*, clause 9(2)(a); *B.C. Act*, subclause 5(2)(b)(i). Such statutes have provided that an acknowledgment is effective even if it is accompanied by a refusal to pay: *see Limitation of Actions Act*, clause 9(2)(b); *B.C. Act*, subclause 5(2)(b)(ii). A renewed limitation period remains justified because of the debtor's reduced need for limitations protection when he has admitted his duty to pay a debt.

8. Acknowledgments may be encountered in connection both with unsecured debts and other liquidated pecuniary claims, and with secured debts.

a. *Unsecured Debts*. If a debt is unsecured, the creditor's claim will be for a personal remedial order directing the debtor to pay the debt. S. 9(2) provides that if an obligor of a liquidated pecuniary sum, as a debt or otherwise, admits his duties with respect to the obligation on which the claim is based, the limitation period applicable to the claim will begin anew at the date of the admission.

b. *Secured Debts*. If a debt is secured, the creditor's claim may be for a remedial order for the collection of the debt through the realization of the security interest in the secured property. If the debtor admits his duty to pay the debt and the creditor's right to collect the debt through the realization of a security interest, the limitation period applicable to this claim begins anew at the date of the admission. As in the case of the unsecured obligation, this rule extends to a security interest for any obligation with

respect to a liquidated pecuniary sum. The same result would be achieved under the *Limitation of Actions Act*: *see* ss. 35(2) (acknowledgment of mortgage of real or personal property); cl. 37(2)(b) (acknowledgment of right of vendor under agreement for sale of land); and cl. 39(2)(b) (acknowledgment of right of vendor under conditional sale of goods).

9. *Estate Personal Property*. Read with ss. 10(4), ss. 9(2) covers a claim against a personal representative for a share of estate personal property where a claim seeks to obtain a liquidated pecuniary sum.

Part Payment

10. Ss. 9(2) continues to give effect to the doctrine of part payment which gives the claimant creditor a renewed limitation period from the time of the last part payment. It carries forward the policy in the *Limitation of Actions Act*, subclause 9(1)(b)(iii) (part payment of principal or interest on a debt); clause 14(2)(a) (part payment of a share of estate personal property); clause 15(2)(a) (part payment of arrears of rent or interest on a monetary estate share); ss. 35(1) (part payment of principal or interest on a debt secured by a mortgage of real or personal property); clause 36(2)(a) (part payment of purchase money under an agreement for sale of land, claim by purchaser); clause 37(2)(a) (part payment of purchase money under an agreement for sale of land, claim by vendor); and clause 39(2)(a) (part payment of price or interest under a contract for the conditional sale of goods).

11. The doctrine permits the claimant creditor to bring and to maintain an action many years after the limitation period applicable to the first arrears has expired. It is justified under limitations policy because the limitations system is not designed to force creditors to bring claims when the circumstances indicate that this is unnecessary. If the defendant debtor has made a part payment, this will induce the creditor to believe that prompt litigation is not necessary, and it will also support an inference that the debtor does not need the protection of a limitations system until the expiration of a new limitation period. In short, the doctrine of part payment is convenient for a creditor, and may not jeopardize a debtor.

12. As in the case of an acknowledgment, the part payment, to be effective, must be made before the expiration of the applicable limitation period. Without this limitations shield, the defendant would be particularly vulnerable to a part payment allegation, for which there is no writing requirement for proof, brought by a claimant after the expiration of the normal limitation period.

13. Like acknowledgment, by ss. 9(1) and (2), the part payment must be made by a person under a duty to pay a liquidated pecuniary sum, as a debt or otherwise. Read with ss. 10(4), this will apply to a claim against a personal representative.

14. Like acknowledgment, ss. 9(3) continues to eliminate the common law requirement that a promise to pay the debt be inferred from the part payment: *see* the present Alberta Act, clause 9(2)(a).

Subsection 9(4) - Interest on Debt

15. Ss. 9(4) resolves any doubt about the effect of a part payment of interest in renewing a limitation period for interest then due that may otherwise exist in the interpretation of s. 9. Such doubt exists with respect to the interpretation of the *Limitation of Actions Act*, s. 9(1). The reason for doubt is explained as follows. When a debt carries interest, as it usually will, a part payment of principal will give a renewed limitation period for interest then due because principal and interest constitute one demand: *Halsbury's Law of England* (4th ed. 1979) para. 902. Similarly, a part payment of interest will

give a renewed limitation period for principal then due, again because a payment of interest is treated as a payment against the principal debt. However, a part payment of interest, because it is treated as a payment against principal, will not give a renewed limitation period for interest then due.

The rule is inconsistent with the basic principle that principal and interest constitute one demand. If a part payment of interest is treated as a part payment of principal, and if a part payment of principal gives a renewed limitation period for interest then due, then of necessity a part payment of interest should give a renewed limitation period for interest then due.

[Section 10 - Persons Affected by Exceptions for Agreement, Acknowledgment and Part Payment]

10(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(2) (a) An agreement made by or with an agent has the same effect as if made by or with the principal, and

(b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.

(3) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he derives a claim, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(4) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) he is a maker of it, or

(b) he is liable in respect of a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable in respect of the claim.

Comment

1. Subsection 10(1) - Writing Requirement

2. Ss. 10(1) provides, as does the *Limitation of Actions Act*, that an acknowledgment must be in writing and signed by the debtor or his agent. This permits some confidence to be based on the written document and an inference to be drawn from the admission of liability that the debtor did not need the

protection of a limitations system for a renewed limitation period.

3. Ss. 10(1) further provides that an agreement reducing or extending an applicable limitation period must be in writing and signed by the person adversely affected. In any case in which an acknowledgment would be intentional, an agreement would provide an easier, clearer, and more flexible solution. A debtor who is willing to incur the consequences of the doctrine of acknowledgment would therefore be well advised to avoid the technical requirements and inflexibility of that doctrine, and to make an agreement with his creditor providing directly for the precise limitation results which they desire.

4. There is no requirement that a part payment be proved by a writing signed by the debtor. Whereas there is usually written evidence to prove the existence and amount of a debt, and the fact of a part payment, this is not always the case. Under the part payment doctrine, the creditor can bring a claim after the expiration of the normally applicable limitation period and maintain it with oral evidence of a part payment where, in reality, the debtor may have done nothing which could support an inference that he did not need limitations protection.

Subsection 10(2) - Agency

5. Conventional limitations statutes give an acknowledgment or a part payment made by or to an agent the same effect as one made by or to the principal. Clause 10(2)(a) extends the policy to an agreement reducing or extending a limitation period. Clause 10(2)(b) continues the policy with respect to an acknowledgment or part payment.

Subsections 10(3) and (4) - Benefit and Burden

6. *Benefit*. Ss. 10(3) continues the policy in place under conventional limitations statutes which do not permit either an acknowledgment or a part payment to be effective if made to a stranger to the claim. An acknowledgment or part payment has to be made to the claimant or his agent. No exception is made for an acknowledgment of a specialty debt to a third party.

7. *Burden*. Ss. 10(4) provides that a person is bound *only* if he is the maker, or if his liability under a claim is derived as a successor from that of a predecessor maker. There are two situations in which a person will be liable under a claim as a successor of a predecessor who was liable under the claim. In the first situation, a successor may assume the personal liabilities of a predecessor by contract, or, in some cases, those liabilities may be imposed on him by law. In the second situation, a person will be liable under a claim as a successor as a matter of law because he has acquired an interest in property from or through a predecessor who was liable under the claim. In this situation the liability is imposed on a person only through the acquired property interest, and not personally.

8. When joint obligors are severally liable, only the maker will be bound and not his joint obligors. This policy is conforms with the present Alberta Act, ss. 10 and 11, which include personal representatives as well as joint obligors.

[Section 11 - Judgment for Payment of Money]

11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Comment

1. S. 11 excepts a claim based on a judgment or order for the payment of money from the 2-year discovery and 5-year ultimate limitation periods set out in s. 3, and substitutes a fixed limitation period of 10 years.

2. In effect, s. 11 continues the requirement, in s. 4(1)(f) of the present Alberta Act, that an action on a judgment or order for the payment of money be brought within 10 years after the cause of action on the judgment arose.

3. S. 11 has to do with the renewal of a judgment, whether domestic or foreign, for the purpose of enforcing it. The procedure for collecting on the judgment is a matter lying outside the realm of a general limitations statute. (Enforcement orders are expressly excluded from the scope of application of the new Alberta Act by the definition of remedial order: *see* cl. 1(i), comments #25-26.)

4. As with the main limitation provisions, the defendant must plead the limitations defence. It is not self-activating, and s. 11 does not extinguish rights.

[Section 12 - Conflict of Laws]

12 The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

Comment

1. S. 12 provides for the application of Alberta limitations law where a claim brought in Alberta (the forum jurisdiction) will be adjudicated under the substantive law of another jurisdiction (the foreign jurisdiction) in accordance with the applicable principles of private international law (conflict of law rules).

2. In mandating the application of Alberta limitations law irrespective of how the limitations law of the foreign jurisdiction is classified, s. 12 eliminates the classification problem that is present under the traditional approach. Under that approach, where the relevant limitation provisions of the forum and the foreign jurisdictions differ, the court must classify the limitations law of the foreign jursidiction as either procedural or substantive. The limitations law is usually classified as procedural if it merely bars a remedy and as substantive if it also extinguishes the underlying right. Where the limitations law of the foreign jurisdiction is classified as procedural, the forum court will apply its own limitations law to the claim; where it is classified as substantive, the forum court will apply the limitations law of the foreign jurisdiction. The question whether only the remedy is barred, or whether the right is also extinguished, is often technical and the inquiry can be very complex if the foreign law is not based on the English common law.

3. S. 12 is based on two underlying policy determinations: first, that limitations law is properly classified as procedural law; and second, that courts should, as a general proposition, apply local procedural law.

4. *Limitations law is procedural.* One of the most important reasons for a limitations system is to protect defendants from the injustice which can flow from litigation based on stale evidence. Rules of evidence are classified as procedural law, and an Alberta court will apply Alberta evidence rules in litigation before it. This is a potent reason for a jurisdiction to apply its own limitations law to claims before its courts, even if the substantive law being applied is that of another jurisdiction.

5. *Courts should apply local procedural law.* Limitations law is based on a foundation of legal philosophy and concepts of fairness. Applying the limitations law of Alberta ensures the application of a just limitations system in accordance with accepted Alberta principles because the Alberta law reflects what Alberta believes is the fairest balance between the conflicting interests of claimants and defendants. This is preferable to the alternatives of requiring the forum court to assess limitations laws in other jurisdictions, particularly those having a different foundation, for fairness; and of opting to apply the limitations law of the jurisdiction whose substantive law will control a claim whether or not it achieves the public policy objectives represented in the local limitations system. It is also preferable to the confusion and unwarranted litigation likely to be

produced by a solution using judicial discretion to ensure that just limitation provisions are applied to claims.

6. S. 12 is open to two criticisms: first, that it does not achieve the policy objective of promoting comity between the forum jurisdiction and the foreign jurisdiction (mutual respect among jurisdictions is enhanced if forum courts defer to and apply laws of other jurisdictions in appropriate cases); and second, that it may encourage forum shopping. As to the first criticism, under accepted conflict of laws principles, jurisdictions are free to apply their own procedural law to cases before their courts, limitations law has generally been considered procedural law and s. 12 is premised on it being so classified. Applying Alberta limitations law is therefore unlikely to have an erosive effect on comity among jurisdictions. As to the second criticism, that fact that the claimant may be able to look for a jurisdiction whose limitations law has not run out against his claim appears to present a greater difficulty in theory than in actual practice. For many years now a large percentage of Alberta's commercial transactions have been international transactions and this has not yet bred serious conflicts problems in limitations law.

7. S. 12 applies to the entire Alberta limitations system. That is to say, although the basic application rule defines only the coverage of the Act, s. 12 applies as well to limitation provisions in other Alberta acts.

[Section 13 - Transitional]

13*(1) Subject to subsection (2), this Act applies where a claimant seeks a remedial order in a proceeding commenced after the date the Act comes into force.*

(2) A defendant is not entitled to immunity from liability in respect of a claim of which the claimant knew, or in his circumstances ought to have known before this Act came into force and in respect of which a remedial order is sought

(a) in time to satisfy the provisions of law governing the commencement of actions which would have been applicable but for this Act, and

(b) within 2 years after the date this Act comes into force.

Comment

1. Ss. 13(1) will benefit defendants in those cases in which the time available to a claimant to commence a proceeding under the present Alberta Act is reduced.

2. Ss. (2) makes a countervailing concession to claimants. It assures that every claimant whose claim would be within time under the present Alberta Act will have no less than 2 years after the new Alberta Act takes effect within which to seek a remedial order in respect of the claim. That is to say, where the claimant knows or ought to know of a claim, the coming into force of the Act will trigger a 2-year limitation period. The coming into force will operate like discovery.

3. By way of illustration, assume that the new Act takes effect on January 1, 1991, that the defendant, Neil, was in breach of his contract with Harriet on July 1, 1989, and that Harriet knew or should have known of the breach on that date. The limitation period under the present Alberta Act is 6 years from the date of breach. Under that Act, Harriet would have until July 1, 1995 within which to commence proceedings against Neil. As of January 1, 1991, Harriet would still have 4 and 1/2 years left within the limitation period. The limitation period under the new Alberta Act is 2 years from the date the Act comes into force. Under it, Harriet has until January 1, 1993 to commence proceedings within the limitation period. The new Act reduces the time available to Harriet by 2 and 1/2 years, from July 1, 1995 to January 1, 1993.

[Section 14 - Consequential]

14*(1) Section 60 of the Law of Property Act is amended by adding the following:*

(3) No right to the access and use of light or any other easement, right in gross or *profit a prendre* shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.

(2) The Limitation of Actions Act is repealed.

Comment

Section 15(1) - Prescription of Light

1. S. 15(1) transfers s. 50 of the present Alberta Act to the *Law of Property Act*. S. 50 provides that, although Alberta received the common law, it never received the doctrine of prescription insofar as the rights described in s. 50 could have been acquired by prescription. The doctrine of prescription has its origin in the common law, is extremely complex, and although it is not properly part of limitations law operates in much the same way, which explains the inclusion of s. 50 in the present Alberta Act.

Section 15(2) - Repeal of the Present Alberta Act

2. The new Alberta Act introduces an entirely new approach to limitations law. As such it replaces the present Alberta Act, and s. 15(2) therefore provides for the repeal of the present Act.

APPENDIX A

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APPENDIX B

LIMITATION OR NOTICE PROVISIONS IN SPECIALIZED ALBERTA ACTS

Appendix B is reproduced from Appendix C in the Report for Discussion. It contains a list, prepared in 1986, of the specialized statutes in Alberta which we believe contain limitation or notice provisions which are within the scope of the limitations system but are exempted from the general limitations statute recommended in this report. We have attempted to exclude limitation and notice provisions which are related to: (1) the time of commencement of prosecutions for provincial offences; (2) proceedings before administrative and ministerial authorities exercising statutory powers; (3) claims requesting judicial review of the exercise of statutory powers; and (4) proceedings after the commencement of a civil judicial action.

Appendix B is organized in a columnar form, with columns 1 to 4 running from left to right. Column 1 contains the name of the Act, column 2 contains the chapter designation for the Act in the Revised Statutes of Alberta 1980, and column 3 contains the section or subsection number of the limitation or notice provisions. Column 4 contains letters indicating whether the provisions are, in our view, limitation or notice provisions, and if the latter, the type of notice provisions. In column 4 the letter or letters have the following meanings:

L	Limitation
NAE	Notice after event
NBA	Notice before action
MN	Miscellaneous notice.

Name of Act	Chapter	Section	Type
Administration of Estates	A-1	39	MN
		42	L
		50(2)	L
Age of Majority	A-4	12	L
Alberta Income Tax	A-31	44.1(4)	L
Bulk Sales	B-13	12	L

Name of Act	Chapter	Section	Type
Business Corporations	B-15	35(5)	L
		113(9)	L
		114(4)	L
		(125(2)	L
		219(2)	L
		219(4)	L
Chattel Securities Registries	C-7.1	12(2)	L
Companies	C-20	14(5)	L
		45(5)	L
		47(3)	L
		91	L
		100(2)	L
Co-operative Marketing Association and Rural Utilities Guarantee	C-25	12(6)	L
Credit Union	C-31	105(2)	L
		105(3)	L
Defamation	D-6	13(1)	NAE
		13(1)	NBA
Dower	D-38	11(4)	L
Election	E-2	207(1)	L
		207(2)	L
Expropriation	E-16	63(4)	NAE
Family Relief	F-2	15(1)	L
Fraudulent Preferences	F-18	3	L
Individual Rights Protection	I-2	6(6)	L

Name of Act	Chapter	Section	Type
Insurance	I-5	165(2)	L
		171(2)	L
		210	NBA
		275(1)	L
		299	NAE
		299	L
		320(2)	L
		332	L
		357	NAE
		357	L
		395	NAE
		414	NAE
		414	L
Irrigation	I-11	172(1)	NAE
		181(2)	NAE
Land Titles	L-5	122(3)	L
		164	NBA
		168(1)	L
		168(2)	L
Maintenance and Recovery	M-2	14(1)	L
Masters and Servants	M-8	9	L
Matrimonial Property	M-9	6(1)	L
		6(2)	L
		6(3)	L
Motor Vehicle Accident Claims	M-21	6(1)	MN
		9(2)	NAE
		9(3)	L
		9(7)	L
Municipal Goverment	M-26	188(9)	NAE
		188(9)	L
		190	L
		402(1)	NAE
		404	NAE
		405	NAE
Public Highways Development	P-28	38(8)	NAE
		39(3)	NAE
Reciprocal Enforcement of Judgments	R-6	2(1)	L

Name of Act	Chapter	Section	Type
Securities	S-6.1	175	L
Trust Companies	T-9	45(2) 77(2)	L L
Ultimate Heir	U-1	6	L
Water, Gas, Electric and Telephone Companies	W-4	15	NAE
Woodmen's Lien	W-14	9(1)	L